Report
on
Section 9 of
THE REGISTRATION OF DEEDS ACT

NEWFOUNDLAND LAW REFORM COMMISSION

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The Newfoundland Law Reform Commission was established by *The Newfoundland Law Reform Commission Act, 1971,* S.N. 1971, No. 38.

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PREFACE

This report is the first for the Commission on the vast and complex subject of execution law. Newfoundland is not unique in recognizing the need for reform and undertaking research in this area. In recent years law reform agencies in Canada[1] and throughout the Commonwealth[2] have published numerous reports dealing with one or more aspects of the subject. The Ontario Law Reform Commission produced a comprehensive study consisting of five volumes stretching over three years and covering virtually all aspects of the subject.[3]

In Newfoundland, a review of execution law was one of the first items which the fledgling Commission placed on its project agenda after its initial appointment by government in 1981.[4] In carrying out its research in this area, the Commission has taken guidance from the work of other law reform bodies. However, it has become evident that a considerable amount of existing research from other jurisdictions is not directly transferrable to the Newfoundland scene. This is because of a number of peculiarities in the execution law of this province, many of which may be traced to our legal history. This is especially so in the case of execution against land.[5] The process of understanding these peculiarities has necessitated considerable research of a legal historical nature. Much of this has now been completed. In December 1989, the Commission made some of the results of this research available in its *Legislative History of the Judicature Act 1791-1988*.[6]

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1 Eg. The Law Reform Commission of British Columbia, *Report on Execution Against Land* (1978); *Report on Creditors' Relief Legislation: A New Approach*; New Brunswick Department of Justice Law Reform Division, *Third Report of the Consumer Protection Project: Vol. II, Legal Remedies of the Unsecured Creditor After Judgment* (1976); Alberta Institute of Law Research and Reform, *Debt Collection Practices* (1984); *The Operation of the Unsecured Creditors Remedies System in Alberta* (1986); *Remedies of Unsecured Creditors* (1986).

2 Eg. The United Kingdom, *Report of the Committee on the Enforcement of Judgment Debts* (1960); New South Wales, *Draft Proposals Relating to the Enforcement of Money Judgments* (1975).

3 Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Parts I-V) (1981-1983).

4 The Newfoundland Law Reform Commission was established by *The Newfoundland Law Reform Commission Act, 1971*, S.N. 1971, No. 38. The Commission was activated in 1981; the first Commissioners were appointed pursuant to Minute-in-Council J. 359-81. The Commissioners were: John J. O'Neill, Q.C., Chairperson; Carol Ann Beson; Linda Hunt Black; Margaret A. Cameron; J. Derek Green; and Carl R. Thompson.

5 See, Gushue, Q.C., *The Law of Real Property in Newfoundland*, (1926), 4 Can. B. Rev. 310, and McEwen, *Newfoundland Law of Real Property: The Origin and Development of Land Ownership*, (1978, unpublished Ph.d. Thesis, University of London.)

6 NLRC-IWD4, December 1989.

There can be no doubt that the Commission is reflecting a view widely held both within and without this province's legal profession when it takes the position that the operation of the existing system of execution with respect to civil judgments in this province is greatly in need of reform. This has been the consistent theme of a number of working sessions held with senior members of the Bar[7] and of replies in response to discussion papers circulated by the Commission for the purpose of inviting comment from the Bench, the Bar, and other interested parties.[8] The consensus is that in its present form this province's system of execution is unnecessarily cumbersome, based on antiquated and outmoded concepts and principles, uncertain in many important aspects, capricious in its operation and generally productive of injustice in individual situations.[9] The problems extend even to such basic issues as the authority for execution against land.[10]

The question the Commission faces is where best to direct its limited resources. One of the matters that has received more prominence and increased judicial comment in the past few years has been the effect of execution priorities on the conveyancing process.[11] For the Commission's first report in the area of execution law, the focus has been narrowed to this topic. The reason behind this choice is two fold: first, the area itself is fairly self-contained and can be studied without extensive reference to the larger body of execution law; and second, this area of law appears to be in pressing need of reform.

In a real sense, however, this Report should be regarded as a small piece of a much larger puzzle. The Commission's ultimate objective, an objective admittedly dependent on time and resources, is a review of the entire field of execution law in the province. We take the position that comprehensive legislation in this area is long since overdue.

The Commission would like to acknowledge the generous support of the provincial Department of Justice throughout our work in this area. In particular we would like to thank the Minister of Justice for the Province, the Honourable Paul D. Dicks, Q.C., and Mr. James Thistle, Q.C., Deputy Minister of Justice. We would also like to acknowledge the assistance of Mona Pierce, Legal Librarian, Department of Justice; A. John Noel, Senior Legislative Counsel; and Alphonsus Faour, Deputy Clerk of the Executive Council.

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7 The Newfoundland Law Reform Commission, *Summary of Round Table on Execution Law*, IWD1, 1987.

8 The Newfoundland Law Reform Commission, *Discussion Paper on Selected Aspects of Execution Law*, IWD2, 1989.

9 For example, see the comments of Riche D. C. J. (as he then was) in *Hiscock* v. *Stafford* (1984), 46 Nfld. & P.E.I.R. 221 at 227 (Nfld. DC); see also, Gushue J. A.'s comments in *Gough* v. *Esso Home Comfort Centre* (1988), 71 Nfld. & P.E.I.R. 226 at 230 (Nfld. C.A.).

10 See discussion *infra*, at 3ff.

11 See for example, *Gough* v. *Esso Home Comfort Centre* (1988), *supra*, n. 9; and Newfoundland Continuing Legal Education, *What is Good Title* (1990).

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NEWFOUNDLAND LAW REFORM COMMISSION

October 1990

The Honourable Paul D. Dicks, Q.C.
Minister of Justice and Attorney General
Confederation Building
St. John's, NF
AlB 4J6

Dear Minister:

Pursuant to the provisions of *The Newfoundland Law Reform Commission Act, 1971*, I have the honour to present to you the Commission's *Report on Section 9 of The Registration of Deeds Act.*

J. Derek Green, Q.C.
Chairman

CHAPTER 1

EXECUTION AGAINST LAND AND THE CONVEYANCING PROCESS

1. Introduction

Three elements are essential to any system of execution against land or an interest in land.[1] In the first place, there must be a right to execute, to seize and sell the land of the execution debtor in order to satisfy the claim of the execution creditor. Secondly, apart from the right to execute, some act must be designated, the doing of which triggers the right of the execution creditor to realize upon the execution debtor's land. In most common law jurisdictions, this is referred to as the act which *binds* the land.[2] Finally, as the execution creditor may be only one of a number of people who claim an interest in the execution debtor's land, there must also be some method for determining priorities, that is, for deciding whether the execution creditor's claim to the land takes precedence over other claims, including those of other execution creditors and of claimants such as purchasers and mortgagees. This report will focus chiefly on the third issue, the issue of priorities.

This report has its origin in the case of *Gough v. Esso Home Comfort Centre*.[3] The issue in *Gough* concerned an aspect of the third element discussed above: the question of who, as between an execution creditor and a purchaser, had the better claim to an execution debtor's land.

The execution creditor's interest in the execution debtor's land is grounded ultimately in a judgment of the court against the debtor. In the usual case, the execution creditor will cause an execution order to be issued pursuant to this judgment. Through the execution process, the creditor may acquire rights against the debtor's land. However, the execution creditor is not the only person who can acquire an interest in the debtor's land. Through the conveyancing process, the debtor can transfer an interest in his land to a purchaser or a mortgagee. It may well happen that an execution creditor and a purchaser will make a claim to the same piece of the execution debtor's land. How is this problem to be resolved? Whose claim takes priority?

In this kind of situation, there must be a rule to resolve the priorities issue. In Newfoundland, the rule for determining priorities is affected by a

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1 In this report, *land* will be used rather than *real property*. *The Chattels Real Act*, 4 Wm. 4, c. 18 (Nfld), raises serious questions as to the use of the term *real property* in Newfoundland. See *infra*, at 5ff. for a discussion of the effect of *The Chattels Real Act*. *Land*, because it includes both real property and chattels real, is a less problematic term.

2 The concept of *binding* is discussed at 19f.

3 (1988), 71 Nfld. & P.E.I.R. 226 (Nfld. C.A.). See *infra*, at 13f. for an account of the facts in this case.

number of problems. The case of *Gough* v. *Esso Home Comfort Centre* focuses on one of them. For the Commission, a close examination of the *Gough* case has revealed other, and more basic, problems with this province's system of execution against land. These difficulties relate to all three of the elements referred to above.

2. Present Statutory Resolution Of Priorities

In this province, the statutory resolution of the priorities issue is to be found in section 9 of *The Registration of Deeds Act*:[4]

> 9. All instruments made after the twenty-seventh day of March, Anno Domini eighteen hundred and sixty-two, and not duly proved and registered, and every mortgage by deposit of deeds without writing, shall be judged fraudulent and void both at law and in equity, as against any subsequent purchaser or mortgagee for valuable consideration who shall first register his instrument, or against any trustee of an insolvent estate, or any assignee or trustee under a conveyance for the benefit of creditors, *or against any creditor who shall have actually seized or levied under attachment or execution:* Provided that such attachment, with a description of the property attached, shall be entered by the sheriff in his office books immediately after such attachment shall be executed and duly returned. [emphasis added]

The potential for conflict between an execution order and a conveyance only becomes a reality after the sheriff has *actually seized*[5] the land and made an entry in his books. Any deed registered after this date is fraudulent and void as against the execution creditor.

Before considering section 9 and the priorities issue in detail, it is necessary to discuss other issues. Section 9 presupposes, in the first place, that it is possible to execute against land in Newfoundland. In the second place, section 9 also presupposes that one can determine, clearly and distinctly, when an execution order gives the execution creditor the right to seize and sell the execution debtor's land, i.e. when it *binds* the land.

The Commission's investigation has revealed that the answers to these questions are not as clear as might at first be thought. We, therefore, propose to consider the following issues:

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4 R.S.N. 1970, c.328.

5 The term *seizure* or *actual seizure* is used in the context of both land and personal property. Although the same word or phrase is used, it must be kept in mind that *seizure* or *actual seizure* has a different meaning depending on whether it is used in connection with execution against land or personal property. In the latter case, the sheriff may remove the property from the execution debtor's possession. The seizure of the execution debtor's automobile would be an example. This is clearly impossible in the case of land. One cannot remove land from a person's possession except in the sense of excluding the judgment debtor therefrom. In practice, *seizure* of land has meant the posting of a notice by the sheriff somewhere on the land to indicate that the land is subject to an execution order. In the discussion of the seizure of land, it should be kept in mind that what is meant by *seizure* or *actual seizure* is the posting of the execution debtor's land by the sheriff. For a further discussion of this point see, *infra*, chapter 2, at 19ff.

(1) whether there is any authority in this province for execution against land;
(2) how the execution creditor acquires the right to seize and sell the execution debtor's land, and
(3) when the execution creditor's claim to the judgment debtor's land takes priority over the claim of those who hold an interest in that land under an instrument.

3. The Authority For Execution Against Land

The development of execution law in this province coincides with the growth of the province's legal institutions. At the risk of oversimplifying, from earliest times the general policy of Great Britain towards Newfoundland was to discourage extensive colonization and settlement. Britain regarded the Newfoundland fishery as of singular importance, first for purposes of trade and second as a training ground or nursery for able and experienced seaman ready to man the royal navy.[6] It was thought that these ends militated against permanent government and extensive settlement. It is, therefore, hardly surprising that the development of legal institutions within the province was slow, and such as did exist prior to 1791, the date of the colony's first Judicature Act, [7] might best be described as rough and ready. With the Act of 1791, however, a Court of civil jurisdiction was created, with power to decide summarily in matters of debt, contracts, trespass, etc., relating to the person and personal property.

Newfoundland was a British colony by virtue of discovery and settlement. The established doctrine as to the origin of colonial law in such cases is stated by Baron Parke in the leading case of *Keilley* v. *Carson*[8] heard before the Judicial Committee of the Privy Council in 1842:

> Newfoundland is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the mother-country carried with them such portion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects.[9]

The law of England was *received* in Newfoundland as a result of discovery and settlement and applied in the colony to the extent that conditions and circumstances allowed.[10] It has been established in a number

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6 *Legislative History of the Judicature Act, 1791-1988*, (NLRC-IWD4, December 1989) at pp. 1-18; see also McLintock, *The Establishment of Constitutional Government in Newfoundland: A Study of Retarded Colonization*, 1941; see generally K. Matthews, *Lectures on the History of Newfoundland 1500-1830*, (1988).
7 31 Geo. 3, c. 29 (U.K.).
8 (1842) 4 Moo.P.C. 63.
9 *Ibid.*, at 84-85.
10 E. Archibald, Q.C., *Digest of the Laws of Newfoundland*, 1847, at 38.

of cases, including most recently *Buyer's Furniture Ltd.* v. *Barney's Sales and Transport Ltd. et al*,[11] that the cut-off date for the automatic reception of English law in the colony was July 26, 1832, the date of the establishment of the first Legislative Assembly. After July 26, 1832 statutes of the Imperial Parliament applied in the colony only in the event of express reference or by necessary implication.

In so far as execution law is concerned, the English laws in this regard, to the extent that they were applicable to conditions and circumstances in the colony, were received in accordance with the conventional rule and could be considered in force upon settlement. Emphasis, however, must be laid upon the qualifying phrase, "to the extent that such were applicable to conditions and circumstances in the colony;" for it is clear that execution law in the North American colonies generally developed along different lines than the English law in this regard. In contrast, for example, to the remedies available to the execution creditor in England, which did not give the creditor any right to sell the debtor's land, authority for execution against land existed in the colonies as early as 1732. Section 4 of *An Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America*[12] provided as follows:

> [T]he houses, lands . . . and other hereditaments and real estates, situate . . . within any of the said Plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind so ever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof . . . in any courts of law or equity in any of the said Plantations . . . for seizing, extending, selling or disposing of any such houses, lands . . . and other hereditaments and real estate, towards the satisfaction of such debts, duties and demand, and in like manner as personal estates. . .

Reference in *Wallbank* v. *Ellis*[13] in 1853 would seem to imply that this statute was considered to be in force in the colony of Newfoundland; as such it would have provided a basis for execution against land as early as 1732.

However, the Act of 1732 was not law in Newfoundland by virtue of reception. The Act of 1732 was not law for England; it was legislation for the North Amerian colonies and in force *proprio vigore* (by its own force).

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11 (1983) 43 Nfld. & P.E.I.R. 158, at 160-161 (Nfld. CA)(Gushue J. A., for the court.).
12 5 Geo. 2, c. 7 (U.K.).
13 (1853) 3 Nfld. L. R. 400 (Nfld., S.C.).

It remained the law of Newfoundland until repealed by the English Parliament. Accordingly, with the repeal of the 1732 Act by the Imperial Statute Law Revision Act, 1887,[14] the 1732 Act ceased to be a part of the law of Newfoundland. The colonial legislature in Newfoundland did not enact replacement legislation. It is not altogether clear why this was regarded as unnecessary.[15]

In his notes to the *Judicature Act, 1824*[16] and to *The Royal Charter,* Edward M. Archibald, Q.C. provides passing comment on the development of the court's jurisdiction in matters of executions. Speaking of the phrase "goods, debts or effects" as it appears in section 16 of the Act of 1824, he says:

> Under these words, even before the passing of the Act [*The Chattels Real Act*, 4 Wm. 4, c. 18 (Nfld.)] declaring all landed property real chattels, it was the practice to attach and sell the interest of parties in real estate. In the late Act [*An Act to Amend the Law of Attachment*, 6 Vict. c. 10 (Nfld.)] amending the law of attachment, the words used are "lands, goods, debts, or effects."[17]

Archibald does not make reference to the Statute of 1732 in this passage. However, he does make it clear that interests in realty were subject to the execution process (viz. attachment and sale) in Newfoundland prior to *The Chattels Real Act*[18] of 1834. It is unlikely that authority for this practice *in its fullest extent* can be found in the various Judicature Acts 1791-1824. In any event, it appears that section 16 of the 1824 Act as well as the Act of 6 Vict., c. 10 applied only to situations where pre-judgment attachment had been granted.

In 1834 the Newfoundland legislature passed *The Chattels Real Act*,[19] which provided that all land in Newfoundland was thenceforth to be held as chattels real. *The Chattels Real Act* is reproduced in Appendix A to this Report.[20] The conventional wisdom[21] has been that because chattels real were exigible under common law it follows that land in Newfoundland has

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14 50-51 Vict., c.59 (U.K.).

15 See C. Dunlop, *Creditor-Debtor Law In Canada* (1981), at 135-136. For a discussion of, *inter alia*, the distinction between English law received in the colony and Imperial law in force *proprio vigore*, see J. E. Cote, "The Reception of English Law" (1977), Alta. L.R. 29 and Law Reform Commission of Saskatchewan, *The Status of English Law in Saskatchewan* (1990), chapter 2. A possible explanation for the apparent assumption that replacement legislation covering execution against land was unnecessary might have been the assumption that the *Chattels Real Act*, discussed, *infra*, at 5f. rendered it unnecessary.

16 5 Geo. 5, c. 47 (U.K.). See Appendix A of this Report for Section 16 of *The Judicature Act, 1824*.

17 *Supra*, n. 10, at 60.

18 4 Wm. 4, c. 18 (Nfld.).

19 *Ibid.*

20 *Infra*, at 63f.

21 It is certainly arguable that the intended effect of *The Chattels Real Act* was merely to assimilate moveables to immoveables for the purpose of descent on death, as was done in England by the *Land Transfer Act 1897*, 60 & 61 Vict. c. 65, and in other Canadian provinces by their *Devolution of Estates* legislation.

been exigible under *fi. fa.* (now execution order) at least from the date of passage of the *The Chattels Real Act*, regardless of the effect of the English colonial legislation of 1732.[22] The other effect of the *The Chattels Real Act*, if one accepts the conventional position, is that if land is regarded for all purposes as chattels real then all of the English rules regarding execution against chattels real, as opposed to realty, are the ones which would govern execution in this province; unless, of course, modified by local statute or by the Rules of Court. But conveyancing practice and execution practice in this province appears to take no special account of the fact that all land is to be regarded as chattels real. The most recent Rules of Court define *property* in Rule 1.03(q) as including real and personal property. All this is somewhat perplexing. The uncertain effect of *The Chattels Real Act* is clearly unsatisfactory.

The conclusion to be drawn from the foregoing discussion is that Newfoundland lacks a statute which *clearly* makes land exigible. This is in contrast to most other Canadian jurisdictions where there usually exists a general *Execution Act*[23] or, at the very least, a *Sale of Land Under Execution Act*[24].To the extent that these matters are dealt with at all in Newfoundland, they have been dealt with in the Rules of Court. In 1986, concurrent with the adoption of a new Judicature Act[25], the Rules of Court,[26] which had existed in substantially the same form since 1916, were repealed and a new set of Rules adopted. The new Rules, including those provisions dealing with matters of execution, were based substantially upon the existing Nova Scotia Rules of Court. In Nova Scotia, however, there exists a *Sale of Land under Execution Act*[27]. The Rules in that jurisdiction, therefore, serve the function of fleshing out the details of the statutory execution regime set forth in the applicable governing legislation. In Newfoundland, on the other hand, we have the flesh but no skeleton.

What is the status of the Rules respecting execution against land found in the Newfoundland Rules of Court? With respect to the issue of the types of property which are exigible, the pre-1986 Rules, specifically Order XXXIX, Rule 2, provided as follows:

> Execution may be levied upon moneys, banknotes, bills of exchange, cheques, debentures, bonds, and other securities for money, choses in

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22 Gushue, "The Law of Real Property in Newfoundland," (1926) 4 *Can. B. Rev.* 310, at 313-314.
23 Eg. *Executions Act*, R.S.O 1980, c. 146; *Creditors' Relief Act*, R.S.N.S. 1967, c. 70.
24 R.S.N.S. 1967, c. 275. Section 18 of the *Registry Act*, R.S.N.S. 1967, c. 265, provides that land is bound upon filing of a certificate of judgment in the relevant registry district.
25 *The Judicature Act, 1986*, S.N. 1986, c. 42.
26 *The Judicature Act, 1916*, C.S.N. 1916, c. 83. *The Rules of the Supreme Court, 1916* were appended as a Schedule to this Act.
27 *Supra*, n. 24.

> action, equitable interests in property, real or personal, and *all other property and effects whatsoever.* (Emphasis added.)[28]

The question arises, therefore, as to whether it is sufficient to provide, as Order XXXIX, Rule 2 of the old Rules of Court purported to do, for the conferment of a right to execution by means of subordinate legislation rather than by statute law itself. The matter has been compounded by the repeal of Order XXXIX, Rule 2 of the old Rules at the time of the adoption of the *Rules of the Supreme Court, 1986*. Whether by design or oversight, no equivalent provision was included in the new Rules. The result is that there is now in Newfoundland *no express statement*, either in a Statute or the Rules of Court, as to whether land is exigible under an execution order.

There is no doubt, of course, that the 1986 Rules clearly assume that a broad range of property is subject to execution. For example, Rule 51.02 (1), and the form of execution order itself, directs the sheriff:

> (a) to seize, accept as a receiver, hold and sell at public auction *any property in which the judgment debtor has an interest*, including any debt, rent, legacy, share, bond, debenture or other security, currency, wages, or other demand, due or accruing due at any time while the order is valid, whether in the possession or custody of the judgment debtor or other person and not exempt by law from seizure ... (emphasis added).[29]

Property is defined in Rule 1.03 (q) as including "real and personal property and any interest therein."[30] It may well be concluded from this that the right to execute against land is necessarily implied from the fact that a creditor is entitled to take out an execution order which directs the sheriff to seize the types of property referred to therein. Nevertheless, this is far from a completely satisfactory situation. There should be no doubt as to whether land may be the subject of an execution order and the legal authority for so doing. In any event, it is to be noted that Rule 51.02 and the form of execution order to which it relates limit the types of property which can be seized to those which are "not exempt by law from seizure." Could it not be argued that those types of property which were not exigible at common law (i.e. land) and which are not now authorized by statute (as opposed to Rules of Court) are in fact not subject to (and therefore exempt from) seizure?

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28 It will be noted that notwithstanding the introduction of *The Chattels Real Act*, the Rules of Court continued to use the phrase *real property*. This underlines the fact that much of the province's legislation has been adopted from other jurisdictions, apparently without making allowance for some of the more unusual features of the Newfoundland legal situation.

29 *The Rules of the Supreme Court, 1986* being Schedule D of *The Judicature Act, 1986*, S.N. 1986, c. 42.

30 See discussion, *supra*, at 6.

Regardless of one's conclusion as to whether the 1986 Rules impliedly confer a right to execute against land, the question still remains as to whether it is sufficient for such right to be conferred by a rule of Court as opposed to a statute. The issue has arisen in cases in other Canadian jurisdictions. In *MacCharles* v. *Jones*,[31] the Alberta Court of Appeal held that the Alberta Rules of Court which purported to create a right to, and regulate, garnishment of debts were *ultra vires* and void because they purported to confer a substantive legal right rather than deal solely with matters of practice and procedure. In a similar vein, the Saskatchewan Court of Queen's Bench in *Materna* v. *Materna*[32] held that a rule of the Saskatchewan Supreme Court which provided that maintenance orders could be enforced by contempt was *ultra vires* the applicable legislation which authorized the making of Rules relating to practice, pleading and procedure. Vancise, J., stated:

> One must then consider whether the rule authorizing the enforcement of orders by . . . contempt is procedural or substantive in nature. As a general proposition the distinction between procedure and substance depends on whether the rule of law being considered operates to create or define a right which, when invoked, will entitle that party in whom the right is vested to relief; or whether the rule of law merely serves as a vehicle for the enforcement of some other right which the parties are ultimately concerned to vindicate or deny.
>
> [T]he enforcement of a judgment or order necessarily involves some deprivation to the person who is subjected to the proceedings, either in his property, as in the case of execution, or in his person, as in the case of attachment or committal. It would seem obvious that this deprivation pertains to rights which are substantive in nature. In my opinion, methods of enforcement of a right are not procedural. A procedural rule cannot destroy a substantive right.[33]

Section 55 of the *Judicature Act, 1986* gives power to a Rules Committee to make Rules to govern "the pleading, practice and procedure" of the Court. This enabling legislation is essentially in the same terms as that which was considered in the cases discussed above. The conclusion reached in these cases was that the power conferred by such enabling legislation was limited to the making of Rules which facilitated procedural matters and did not extend to the creation of new substantive rights. Because of the absence of any legislation in this jurisdiction stipulating what property may be seized in execution, the reasoning in the cases in question may apply with even greater force to Newfoundland.

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31 [1939] 1 W.W.R. 133.

32 [1983] 3 W.W.R. 725.

33 Id., at 733. For a general discussion see Dunlop, *supra*, n. 15, at 5-11. The issue so concerned the Alberta Institute of Law Research and Reform that it issued Report No. 15 entitled *The Validity of the Alberta Rules of Court*, dealing with this specific issue. This Report ultimately resulted in special legislation in Alberta specifically validating all the existing Rules of Court: *Attorney General Statutes Amendment Act*, S.A. 1976. c. 58, s. 6 - now *Judicature Act*, R.S.A. 1980, c. J-1, s. 47.

It may well be suggested that the Rules of Court in this province have a greater status beyond that of subordinate legislation because of the fact that they were annexed to, and perhaps even formed a part of, the Bill to enact the *Judicature Act, 1986* at the time it was passed by the Newfoundland Legislature. Section 2(1) of the Act defines *rules* as the 1986 Rules annexed to the Act as Schedule "D."

Nevertheless, the Rules in other respects are certainly treated as subordinate legislation, capable of amendment and variation by the Rules Committee pursuant to the powers conferred by section 55 of the Act. Indeed, in *MacCharles* v. *Jones*, discussed above,[34] the Court rejected an argument that a provision in the applicable Alberta Statute which provided that Rules made under the Statute would have effect as if embodied in and forming part of the Act imbued the Rules with a special authority which saved them from invalidity.

The conclusion to be drawn from this discussion is that there is a lack of a clearly identifiable authority in this province for execution against land. The Commission regards this state of affairs as unsatisfactory. Given the state of uncertainty on this fundamental point, it is important to state clearly that land is subject to execution. As this province has no Executions Act, we believe that the most appropriate place for such a statement in the short-term, that is, pending introduction of a comprehensive Executions Act, would be in *The Judicature Act, 1986*. Part VII of that Act is entitled, "Attachment, Execution and Distraint." Section 134 of Part VII deals with execution against goods. It would be a relatively simple matter to add a section to this part indicating that all interests in land are exigible. Use of the word *land* instead of the phrase *real property* would avoid the difficulties associated with *The Chattels Real Act*.

The Commission recommends:

(1) The Judicature Act, 1986 should be amended to add a provision stating that all interests in land are exigible.

4. Problems with Section 9 of *The Registration of Deeds Act*

A. The Common Law Background

As noted in section 2,[35] until *actual seizure* of the debtor's land has occurred, the conveyancing system and the execution system run on parallel

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34 *Supra*, at 8.
35 *Supra*, at 2f.

courses. It is at this interaction point that a clash of interests can occur. A problem arises when an execution creditor and a purchaser (or the holder of any interest in land under an instrument) both make a claim to the same land. The question then is to decide who has priority.

It has further been pointed out[36] that, in this province, the contest between a subsequent purchaser and an execution creditor is decided by section 9 of *The Registration of Deeds Act*.[37] According to this section, the interest of any person under an instrument can be defeated by a creditor who has actually seized or levied under attachment or execution and entered the attachment in the sheriff's books before the instrument holder has registered his instrument.

There is no requirement in Newfoundland law that instruments be registered in order to be valid,[38] as is the case, in theory at least, in a land titles system. In this province, a deed (instrument)[39] is, generally, effective from the date of execution as between the vendor and the purchaser.[40] However, the key event for the operation of the priority rule in Section 9 is not the execution of the deed but its registration, and these dates may be several days apart.

The reason for this is that the Newfoundland Bar has not adopted the practice of registry closings. Because the province has but one registry of deeds to serve the entire province, it is impractical to have registry closings. As a result, solicitors conduct closings at their own offices and then send the deeds to St. John's for registration. This expedient, though necessary, leaves open the possibility that in the interim between execution of the instrument and its registration the land may be attached by an execution order.

One of the unique features of section 9 is this attempt to put execution priorities under the same set of rules that apply to priorities as between two instrument holders. Because priorities between an execution creditor and a subsequent purchaser are determined by the date of registration of the deed, an execution creditor in Newfoundland has an advantage with respect to his debtor not available to an execution creditor in, for example, Ontario.

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36 *Ibid.*

37 R.S.N. 1970, c. 328.

38 The one exception is *The Condominium Act*, R.S.N. 1970, c. 57, s. 10, which provides as follows: **10.** (1) Ownership of a unit shall not pass to a person unless there is registered in the Registry the deed, conveyance, order or other instrument of conveyance or confirmation of title conveying or confirming the title of ownership to such person.

39 Throughout this report *deed* and *instrument* are used interchangeably. Although section 9 of *The Registration of Deeds Act* refers to *instruments*, in the usual situation a deed is the instrument by which an interest in land is transferred. For the purposes of the discussion of section 9, the distinction between a deed and an instrument is of no importance.

40 *Butt v. Humber.* (1977), 17 Nfld. & P.E.I.R. 92.

In Ontario and in the other common law provinces, but not in Newfoundland, the rule in *Jellett* v. *Wilkie*[41] applies. According to the rule in this case, an execution creditor may only seize and sell land in which the debtor has a beneficial interest *at the time when the execution order binds the land*. Land which the debtor has conveyed to a third party before delivery of the execution order to the sheriff or to the land titles office, as the case may be, may not be seized under the execution order, regardless of whether the deed has been registered. In such situations, the creditor's option would be to seize the proceeds of sale or to attack the transaction under the province's Fraudulent Conveyances legislation.[42]

Jellett v. *Wilkie* arose in the context of a registry system but is not restricted to it. *Davidson* v. *Davidson*[43] indicates that even in a land titles system, where, theoretically, a conveyance passes no interest until registered, an execution creditor cannot gain priority to the execution debtor's land by registering his execution order between the time of the execution of the deed and its registration. Newfoundland, therefore, appears to be unique among all the common law provinces of Canada in the advantage which it accords to execution creditors, an advantage increased by the absence of registry closings and the consequent lapse of time between execution and registration.

In *Apache Construction* v. *H. P. Holdings Ltd.*,[44] the Court of Appeal (per Morgan J.A.) commented on section 9 as follows:

> In this case, the Legislature in clear and unequivocal language has altered the relative position of debtor and creditor obtaining under the common law. By virtue of s. 9 of the Act no transferee of registered land, in whom the legal title to land may have vested by virtue of a conveyance, is safe unless and until he has registered his title. In the meantime the transferor may have executed a conveyance to a third party or may have created burdens on the land which, if registered before the transfer, may take priority.
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> . . . . .
>
> The plain language of the Act equates a judgment creditor, who has actually seized or levied, with the holder of an instrument of title and declares that as against him all subsequent registered instruments shall be fraudulent and void.[45]

Section 9 can provide a windfall for an execution creditor by allowing him to satisfy his judgment from land which the debtor no longer owns.

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41 (1896), 26 S.C.R. 282.
42 Eg. *Fradulent Conveyances Act*, R.S.O. 1980, c. 176; *The Fraudulent Conveyances Act*, S.N. 1974, No. 29, though in Newfoundland, of course, *Jellett* v. *Wilkie* does not apply.
43 [1946] S.C.R. 115.
44 (1988), 71 Nfld. & P.E.I.R. 52, at 55 (Nfld. C.A.).
45 *Id.*, at 55-56.

Apart from its manifest unfairness, the provision also creates problems in the conveyancing process, especially for conveyancers outside St. John's. Although the purchaser's lawyer may have had a final search made of the registry of deeds and the sheriff's office just prior to closing, a gap of several days may develop between the date of execution and the date of registration depending on the time it takes to transport the deeds to St. John's. Within this period, the sheriff's office may have seized the land that the vendor has conveyed to the purchaser. Under section 9 the deed of conveyance would be fraudulent and void as against the execution creditor.

It may be, however, that this danger is not as serious as it appears at first sight. The delays inherent in the process of actual seizure often make this advantage of no real benefit to the execution creditor. For example, where an execution creditor in St. John's wishes to seize land in Corner Brook, the execution order will have to be sent from the sheriff in St. John's to the sub-sheriff in Corner Brook. The sub-sheriff will then have to locate the land and post it. An entry must then be made in the sheriff's books indicating that the land has been seized. A solicitor in Corner Brook who has had a sub-search made of the sheriff's and sub-sheriff's offices just prior to closing and who finds nothing can be reasonably certain that he will be able to register his deed at the registry in St. John's before the sheriff will have been able to complete the execution process. Thus, in section 9 of *The Registration of Deeds Act*, what is given with one hand may be taken away with the other.

It should also be noted that section 9 has been interpreted in such a way that no person who has notice of a prior unregistered deed at the time he takes his interest, whether an execution creditor, a purchaser or a mortgagee, can claim priority over the unregistered land.[46] To allow the purchaser, mortgagee or execution creditor, who has notice of a prior unregistered deed, to gain priority would be to permit section 9 to be used to perpetrate a fraud.[47] Application of this rule, it can be seen, also ameliorates the potential problems of a delay between execution and registration of instruments.

The final point which should be noted concerns the unique use which section 9 makes of *actual seizure*. In the other common law provinces, the debtor's land is *bound* from the date of filing with the sheriff or from the date that the execution order is registered at the land titles or land registry office.[48] In Newfoundland, by comparison, there is no legislation dealing generally with the question of when an execution order binds land. In the

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46 *Apache Construction vs. H.P. Holdings Ltd.* (1988), 71 Nfld. and P.E.I.R. 52 (Nfld. CA) (Morgan J.A., for the majority).
47 *Id.*, at 56.
48 Dunlop, *supra*, n. 15, at 170-171.

context of section 9, however, it can be said that the execution creditor cannot be assured that his interest in the execution debtor's land is protected as against subsequent purchasers or mortgagees until *actual seizure*. Therefore, to speak very loosely, in this context *actual seizure* appears to be the event which, in effect, binds the land.[49]

In order to protect his interest in the execution debtor's land from subsequent purchasers and mortgagees, the execution creditor must have the sheriff *seize* the land and make an entry in his books indicating that the land has been seized. As indicated, this procedure can sometimes take considerable time. In the meantime, the execution debtor may have sold the land and the purchaser registered his deed of conveyance at the registry of deeds.

The case of *Gough* v. *Esso Home Comfort Centre*[50] is an example of just such a situation. On January 27, 1987, Hann, a resident of Corner Brook, on the west coast of the province, was convicted of theft against his employer, Esso, and ordered to pay restitution. On February 6, Esso took out an execution order against Hann from the Supreme Court in St. John's and delivered the order to the sheriff there. Appended to the execution order was a legal description of the land in Corner Brook which the sheriff was orally instructed to seize. Written instructions to seize the land were received at the sheriff's office on February 13, and a note of the instruction was entered in the sheriff's books. The sub-sheriff at Corner Brook received the execution order from St. John's on February 26.

While Esso was attempting to seize Hann's land, Hann was in the process of selling it. On February 6, 1987, Hann executed a conveyance of the property to Gough. On the day of the closing, Gough's solicitor telephoned the sub-sheriff's office at Corner Brook and was informed that there were no writs of execution or warrants of attachment registered against the property. He then proceeded to close the transaction. On February 16, the deed from Hann to Gough was registered at the registry of deeds in St. John's.

The matter eventually went to trial to determine priority to the land as between Gough and Esso. The trial judge held that Esso had priority. Gough appealed. The Court of Appeal allowed the appeal and held that Gough had priority. On the date when the conveyance from Hann to Gough was registered, the sheriff had not yet seized the land. Under section 9, therefore, the conveyance took priority.

The Court of Appeal noted its dissatisfaction with the operation of the section and recommended that it be changed:

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49 The qualification *in effect* is used because section 9 is, strictly speaking, a defeasance section.
50 (1988), 71 Nfld. & P.E.I.R. 226 (Nfld. C.A.).

> The present *Judicature Act* still requires a seizure by the sheriff following his receipt of an execution order. Unfortunately, what constitutes a seizure or, to put it another way, when that point in time is reached when real property is *in custodia legis* is made no clearer in the present Act or Rules than it was in the old. Thus, the same problems of interpretation exists as before.
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> . . . . .
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> Section 9 is an awkward and often inequitable section which could, in given circumstances, unfairly prejudice both judgment creditors and bona fide purchasers of land. It is surely time that a more suitable method of establishing priorities between them was adopted and this could be readily and simply accomplished by the requirement that execution orders in relation to land, or notice of same, be registered in the registry of deeds in order to be valid as against subsequently registered deeds, as is done in other provinces. The validity of these notices could extend for a limited time period unless renewed and re-registered. By doing so, it would appear that the present uncertainties could be eliminated.[51]

This situation could not arise in the other common law provinces because, elsewhere, seizure is not necessary to protect the creditor's interest in the debtor's land. In those provinces, seizure is only an element in the process whereby land is sold to satisfy a judgment debt. The *Gough* case shows that, in its present form, section 9 is not a satisfactory way of integrating the conveyancing and execution systems. The case also illustrates some of the difficulties under which conveyancers outside St. John's operate.

B. The Vocabulary of Section 9 of *The Registration of Deeds Act*

The problems with section 9 are aggravated by the fact that a number of the concepts used in that section are employed in a way that is peculiar to it. In this section, discussion will focus on this issue. It will be seen that the vocabulary of section 9 is ambiguous, uncertain, and productive of litigation.

(i) *Execution*

In *Re Bayview Estates Limited,*[52] Mahoney J. (as he then was) described *execution* as follows:

> The process of execution is one continuing act. The service of the process by the sheriff by notice to the defendant (the judgment debtor) and by affixing a notice to the land which is the subject-matter of the writ of *fi. fa.* is not enough to constitute execution in itself. Seizure is required ..., that is, taking the property into the custody of the law in order to sell it and thereby have the money due under the judgment in order to satisfy the judgment. Anything short of that cannot be execution....

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51 *Id.*, at 230.
52 (1980), 28 Nfld. & P.E.I.R. 225 (Nfld. SC TD.)

> [It is the duty of the sheriff] to seize and sell the property and satisfy the judgment with the money realized. If he has not done that then he has not executed the writ of fieri facias; he has not completed the task he was ordered to complete.[53]

The discussion of execution in the *Bayview* case took place in the context of whether, under the pre-1986 Rules of Court, it was necessary that a writ of *fi. fa.* be renewed because it had remained *unexecuted*. In that context, it is logical to conclude that execution is not completed until all steps have been taken by the sheriff to realize upon the property attached.

Similarly, Noel J. stated in *Re Central and Eastern Trust Company*:[54]

> Clearly, a writ of *fieri facias* remains unexecuted until the sheriff and his deputies have executed the command contained therein. . . . The writ is executed when the sheriff or his deputies have received the sum of money required to be made pursuant to the command.[55]

Notwithstanding this type of analysis, it is common to say one has *executed* against property as meaning that one has taken the appropriate steps to put the legal machinery in motion to bind a particular piece of property, i.e., to make it subject to and available for satisfaction of a particular judgment or to bring it within the *custody of the law*. In fact, the term in this sense has been used in other reported cases.[56]

In Section 9 of the *The Registration and Deeds Act*,[57] execution is given a narrow rather than an extended meaning. Section 9 provides that an unregistered instrument shall be judged fraudulent and void as:

> against any creditor who shall have actually seized or levied under attachment or *execution*: provided that such attachment, with a description of the property attached, shall be entered by the sheriff in his office books immediately after such attachment shall be *executed and duly returned*.(emphasis added)

It is obvious that the use of the words *execution* and *executed* in this section is intended to refer to a specific act rather than the whole process of execution since, by hypothesis, no continuing protection would be necessary for an execution creditor who has completed the execution process by causing the property to be sold and received the money in his hands. In the context of

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53 *Id.*, at 244.
54 (1980), 32 Nfld. & P.E.I.R. 110 (Nfld. SCTD.)
55 *Id.*, at 114.
56 *Kelly* v. *Progressive Builders Limited* (1970), 1 Nfld. & P.E.I.R. 1 (Nfld. SCTD)(Puddester J.). See also, for example: Furlong, C.J. in *Ross and Basha* v. *Oldford* (1960), 45 M.P.R. 294, at 295 (Nfld.S.C. T.D.):
The *execution* was duly entered in the sheriff's book. . .(emphasis added)
and at 296:
[T]he attachment was *executed* two and a half weeks before . . .(emphasis added)
57 R.S.N. 1970, c. 328.

The Registration of Deeds Act, therefore, execution is given its more limited meaning.

(ii) *Attachment*

In differing contexts, *attachment* has widely different meanings. On the one hand, it can refer to the process of pre-judgment attachment pursuant to an attachment order under Rule 28 of the *Rules of the Supreme Court, 1986*. In another context, it finds use in reference to the common law remedy of attachment of the person, *viz.*, committal for contempt.

More specific to the present discussion, however, is its use as a descriptive term in the normal execution process. The term finds use primarily in this context as a description of the event by which the sheriff can proceed to assert his right to seize and sell the property in satisfaction of the judgment in question. In this sense, the word is used with a meaning akin to its use in the context of personal property security legislation.[58]

When section 9 of the *Registration of Deeds Act* is examined, however, it appears that its use within that statute has two disparate meanings. The reference to seizing or levying "under attachment or execution" would appear to draw a distinction between pre-judgment warrants of attachment and post-judgment writs of execution; yet, the remainder of Section 9 simply refers to "such attachment." It has never been suggested that it is only necessary to enter a description of the property attached in the sheriff's books when dealing with pre-judgment attachments but not post-judgment executions. In the language of the proviso to Section 9, therefore, *attachment* would appear to be used in its generic sense of meaning the event by which the property is brought within the custody of the law.

(iii) *Levy*

It is common in the legal profession to talk of a *levy* upon land as meaning the event which constitutes attachment. Nevertheless, it appears that, as a matter of law, the *levy* is in effect the sum realized by the process of execution. Edwards has stated:

> [T]he goods remain the property of the judgment debtor until they are sold, notwithstanding the seizure, and the levy is not completed until the sale.[59]

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58 See, for example: *Ross and Basha* v. *Oldford*, *supra*, n. 56, at 296:
[T]he mortgage was registered after the sheriff had formally *attached* the land. (emphasis added)
and *Tower Travel Limited* v. *Memorial University of Newfoundland et al* (1984), 48 Nfld. & P.E.I.R. 240, at 244 (Nfld. DC.)(Riche DCJ):
[O]nce the *attachment* is made on the funds, the judgment debtor's power to dispose of these funds ends. [emphasis added]

59 Edwards, *The Law of Execution Upon Judgments and Orders* (1888), at 123.

A similar view is put forward by Mahoney, J. (as he then was) in *Re Bayview Estates*:

> To levy means to take all the necessary steps to enforce payment . . . .
>
> Each of the terms, levy, seizure, and execution are synonymous in that each signifies the action of the sheriff in carrying out the duty imposed upon him, to seize and sell the property and satisfy the judgment with the money realized.[60]

By contrast, the use of the word *levied* in Section 9 of *The Registration of Deeds Act* would appear to be used with a meaning more akin to attachment. The section, which renders an unregistered instrument void as against any creditor "who shall have actually seized or *levied* under attachment or execution," would appear to be speaking of a situation where the sheriff has taken steps to *attach* (i.e. bind) the property but has not finally turned the property into cash.

(iv) *Seizure*

It is the term *seizure* which finds the greatest number of differing uses in various contexts in case law and in the statutes. The phrase *actual seizure* is used in section 9 of *The Registration of Deeds Act* in relation to execution against land and in Section 134 of *The Judicature Act, 1986*[61] in relation to execution against goods.[62] Though the phrase *actual seizure* is used in both sections, the Courts have had difficulty in determining its meaning when applied to execution against land, as opposed to execution against goods. This point was discussed by Riche, D.C.J. (as he then was) in *Hiscock* v. *Stafford*:[63]

> [Counsel for the sheriff] argues that it is impossible to seize lands as you can chattels . . . . He presented cases, both English, Ontario and New Brunswick, all supporting the view that real property or chattels real cannot be actually seized. All that is necessary is that the property which is the subject of the seizure be entered in the books of the sheriff and once this is done the property is then, in fact, seized; further, the placing of the property for sale by advertisement under the writ of *fi fa* is also sufficient to constitute seizure of the property. This is not so in the case of chattels which can be actually seized and taken by the sheriff.[64]

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60 (1980), 28 Nfld.& P.E.I.R. 225.
61 S.N. 1986, c. 42.
62 By contrast, it should be noted that it is only *seized* and not *actual seizure* that is referred to in the otherwise generally comparable section 28 of the *Sale of Goods Act*, R.S.N. 1970, c. 341.
63 (1984), 46 Nfld. & P.E.I.R. 221.
64 *Id.*, at 224.

Questions also arise as to what *seizure* means in other contexts and whether it is of significance. In the context of whether a *bona fide* purchaser should be prejudiced by the existence of an outstanding execution order, the date of seizure is obviously critical. It may not be as critical in other situations. For example, it will only be important in the context of determining the priorities between two competing execution orders if priority is determined by establishing the first judgment creditor to have *seized* the property, whatever that may mean.[65]

The language of *actual seizure* within the context of section 9 is anomalous and misleading. More significantly, the requirement, as was pointed out in *Gough*,[66] is an awkward and often inequitable means of determining priorities between judgment creditors and *bona fide* purchasers of land. *Gough* suggested that seizure be replaced by a system of registration of execution orders at the registry of deeds. In addition to serving the demands of linguistic precision and clarity, elimination of seizure as the flashpoint in the priorities process would serve also to remove several other problems associated with section 9 including the not insignificant expense involved in posting the land and the concomittant drain on the sheriff's time.

(v) Conclusion

This brief examination has shown that the language of section 9 is ambiguous and has proved a fertile source of litigation. Each of the terms *execution, attachment, levy* and *seizure* comes loaded with great potential for possible misunderstanding. If any lesson is to be taken from this, it is that in an amended section 9 great care must be taken to use these terms sparingly and in as circumscribed a context as possible. In addition, it might well be the case that an amended section would benefit from the elimination of one or more of the terms altogether.[67]

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65 Eg. see Rule 51.02(1) of the *Rules of the Supreme Court, 1986, supra*, n. 29, which is replete with references to *seize, seizure*, and *seized property*. Does seizure in this context contemplate the same sort of action on the land as that which Riche D.C.J. (as he then was) deemed necessary under the *Registration of Deeds Act* in *Hiscock* v. *Stafford, supra*, n. 63. Or does the common law rule apply, viz. no actual seizure required of chattels real?

66 *Supra*, n. 50.

67 See Appendix B of this Report where a draft of an amended section 9 of *The Registration of Deeds Act* is proposed.

CHAPTER 2

THE ROLE OF SEIZURE IN THE EXECUTION PROCESS

1. Introduction

The previous chapter has disclosed that section 9 of the *The Registration of Deeds Act* determines priority to the land of the execution debtor as between an execution creditor and a subsequent purchaser or mortgagee. The execution creditor's interest in the execution debtor's land is protected as against a subsequent purchaser or mortgagee only when the sheriff seizes the land and enters the attachment in his books. From the execution creditor's point of view, any instrument transferring an interest in the land that is registered after the sheriff has completed the process of seizure and entry in his books is, in the words of section 9, *fraudulent and void* as against the execution creditor (unless the creditor had notice of the instrument prior to his attachment).

It must be remembered that section 9 is a defeasance section. It determines priorities between various interest holders. It does not deal with the nature of an execution order; it states neither when the execution order generally takes effect nor what its effect is. Section 9 speaks of *actual seizure*. This is the event which establishes the priority of the execution creditor's interest in the execution debtor's land as against (but only as against) another instrument holder. Elsewhere in Canada, seizure plays no such role in execution against land. Instead, the writ of execution binds the execution debtor's land as against a purchaser or mortgagee either from the date of delivery to the sheriff or from the date when the writ is recorded at the land titles or land registry office.[1]

In execution against goods, however, seizure does play a role in determining priorities. Is there sufficient similarity between execution against land and execution against goods to justify the use of seizure in both cases? The sections immediately following will explore the justification for the use of seizure in the case of goods and compare this with the use of seizure against land.

2. The Importance Of Seizure In Execution Against Goods

The importance of seizure in the context of execution against goods is related to the notion of the *binding* effect of the writ of execution. The

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1 Eg. *Execution Act*, R.S.O. 1980, c. 146, s. 10(1); *Land Title Act*, R.S.O. 1980, c. 230, s. 47(6).

concept of *binding* has already been mentioned several times. What is the meaning of this concept? *Halsbury's Laws of England*[2] states:

> When it is said that the goods or the property in them are *bound* what is meant is that the sheriff acquires a legal right to seize the goods. Notwithstanding the binding effect of the writ, the ownership continues in the judgment debtor until the sale [by the sheriff] and [the judgment debtor] can legally, *until seizure*, deal with the goods himself or until sale pass the property to others. Any transfer or assignment of the goods after the date at which the binding power of the writ operates will . . . [with two exceptions] be subject to the sheriff's right to follow up and seize the goods under the writ. [emphasis added]

Dunlop[3] has stated that what is meant by the binding effect of the writ of execution[4] is that the sheriff has the right to seize the goods in the hands of the debtor and also in the hands of any transferee, except in the case of sale to a *bona fide* purchaser.[5] *Binding* does not mean that the title or property is transferred from the execution debtor to the execution creditor or to the sheriff.[6]

At common law, the writ of execution bound the goods of the execution debtor from the moment it was issued. If an execution debtor sold his goods after the issue of the writ, the execution creditor had a right to seize them even as against a *bona fide* purchaser for value without notice.[7] This position was obviously unfair to the *bona fide* purchaser. Consequently, the English *Statute of Frauds*[8] provided that the writ should not bind the goods of an execution debtor until it was delivered to the sheriff to be executed; but, even with this amendment, a *bona fide* purchaser was not protected if the writ of execution had been placed in the sheriff's hands. Section 1 of the *Mercantile Law Amendment Act, 1856* therefore went further and provided that no writ of *fieri facias* should prejudice the right of any person to goods acquired from an execution debtor in good faith, for valuable consideration and without notice.[9] Section 16 of the *Statute of Frauds* and section 1 of the

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2 17 Hals. (4th) "Execution," para. 468, at 282.
3 *Creditor-Debtor Law in Canada*, (1981), at 148-149.
4 The term *writ of execution* is used in the narrow sense to mean the ancient writ of *fi. fa.* as developed by subsequent legislation. In Newfoundland, with the introduction of *The Rules of the Supreme Court, 1986*, what was the writ of *fi. fa.* is now called an execution order.
5 Where such a legislative exeption has been established. See Dunlop, *supra*, n. 15, at 145-149 for a discussion of the extent to which protection for the *bona fide* purchaser is granted in the various Canadian Common Law Jurisdictions.
6 Dunlop, *supra*, n. 15, at 148-149.
7 La Forest, "Some Aspects of the Writ of Fieri Facias," (1959) 12 U.N.B.L.J. 39, at 40.
8 (1677), 29 Car. II., c. 3, s. 16 (U.K.).
9 (1856), 19 & 20 Vict., c. 97, s.1 (U.K.).

Mercantile Law Amendment Act, 1856 were re-enacted by section 26 of the English *Sale of Goods Act*.[10]

In Newfoundland, section 26 of the English *Sale of Goods Act* has been re-enacted by section 28(1) of *The Sale of Goods Act*[11] and section 134 of *The Judicature Act, 1986*.[12] Section 28(1) of *The Sale of Goods Act* states:

> A Writ of *Fieri Facias*[13] or other Writ of Execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed . . . provided that no such writ shall prejudice the title of such goods acquired by any person in good faith and for valuable consideration unless such person had at the time he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

Section 134 of *The Judicature Act, 1986* states:

> No execution order against the goods of a judgment debtor is to prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure of the goods where the purchaser did not have notice prior to the time of the purchase that any order by which the goods might be seized had been delivered to and remained unexecuted in the hands of the sheriff.

Thus, notwithstanding the fact that the chattels and goods of the execution debtor are *bound* by the execution order from the moment it is delivered to the sheriff for execution, the execution debtor can still pass good title to a *bona fide* purchaser for value without notice of the execution order until the goods have been *seized* by the sheriff. The register of execution orders maintained by the sheriff is not public notice as is the registry of deeds pursuant to section 7 of *The Registration of Deeds Act*.[14] From a practical point of view, therefore, the date of seizure by the sheriff is the important date in Newfoundland (and in the rest of Canada) relative to execution against goods.

Once the goods have been seized by the sheriff, the interest of the execution creditor takes priority over those of any subsequent purchaser or mortgagee, whether *bona fide* or not. Seizure *closes the loophole* that would have allowed the execution debtor to dispose of his goods free and clear of the claim of the execution creditor. After seizure, the *interest* of the execution

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10 (1893), 56 & 57 Vict., c. 71 (U.K).
11 R.S.N. 1970, c. 341.
12 S.N. 1986, c. 42.
13 The language of *The Sale of Goods Act* has yet to be amended to reflect the changes in the *Rules of the Supreme Court, 1986*.
14 R.S.N. 1970, c. 328.

creditor attaches to the goods into whomsoever's hands they may fall. Dunlop describes the situation this way:[15]

> The special property vested in the sheriff gives him the right to possession and control of the seized goods. On sale, he can convey to a purchaser whatever title the debtor had in his personalty. The execution debtor remains the owner of the seized goods until sale and can convey good title to a third person, but the sheriff is entitled to seize the goods in the hands of the purchaser, whether *bona fide* or not.

Thus, in the case of goods, *seizure* serves a useful, indeed crucial, function.

3. The Role of Seizure in Execution Against Land in Newfoundland

The Chattels Real Act states that all land in the province shall, in the province's Courts of Justice, be held to be *chattels real*.[16] (See Appendix A to this Report.) At common law an execution creditor did not have the right to sell the debtor's land, unless the debtor held a legal interest in chattels real. An interest in chattels real was exigible under a writ of *fieri facias* because it was regarded as personalty. At common law, it was not necessary to *seize* a chattel real, for example, a leasehold interest, or enter on the land. It was sufficient for the sheriff to execute an assignment of the leasehold interest without any seizure whatsoever.[17]

Newfoundland has no general legislative provision which, as in the case of goods,[18] specifically deals with the issue of when or how an execution order binds land. Even accepting that *land* is a *chattel real*, being classified as such does not bring it within the reference to *goods* in *The Sale of Goods Act*.[19] Accordingly, there is no direct statutory authority on this point dealing with land.

In the context of section 9 of *The Registration of Deeds Act*, however, it is clear that *actual seizure*, as well as entry of the attachment in the books of the sheriff, is required to maintain the priority of an execution order

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15 *Supra*, n. 3, at 378.

16 See *supra*, Chapter 1, at 5f.

17 Edwards, *supra*, Chapter 1, n. 59, at 129, citing *Coleman* v. *Rawlinson*, 1 F. & F. 330; *Playfair* v. *Musgrove*, 14 M. & W. 239; and *Harley* v. *Harley*, 11 Ir. Ch. R. 451, at 465.

18 *The Sale of Goods Act*, R.S.N. 1970, c. 341, s. 28(1); *The Judicature Act, 1986*, S.N. 1986, c. 42, s. 134.

19 Section 2(1)(h) of *The Sale of Goods Act*, R.S.N. 1970, c. 341, defines *goods* as follows:
2(1)(h) *goods* includes all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; See also Atiyah, *The Sale of Goods* (1985), at 43.

against an unregistered instrument; but section 9 does not contain any positive statement as to when the execution order is generally effective.

In *Hiscock* v. *Stafford*,[20] Riche D.C.J. (as he then was) discussed *actual seizure* under section 9. He stated:

> [A]ctual seizure must mean exactly what it says. It can only mean that there is some physical act by the sheriff to formally take possession of the lands. I conclude therefore that in Newfoundland to take advantage of *The Registration of Deeds Act*, section 9, there must be an *actual* seizure.[21]

Hiscock in this context was confirmed by the Court of Appeal in *Gough* v. *Esso Home Comfort*.[22] The type or extent of the *physical act* to be taken by the sheriff, however, is not clarified by these cases and remains a matter of conjecture.[23] Nevertheless, it seems clear that at least in the context of *The Registration of Deeds Act* the common law rule that there need be no seizure of chattels real has been excluded. Outside the context of *The Registration of Deeds Act*, the issue is still open as to whether the common law respecting seizure of chattels real applies; that is, attachment may occur without *seizure* or *actual seizure*. Rule 51.02(1) of the *Rules of the Supreme Court, 1986*[24] appears to imply the contrary, however:

> Unless the Court otherwise orders, an execution order . . . . shall direct the sheriff to serve a true copy of the execution order on the judgment debtor or other person in possession of the property at the time of the seizure.

Though this is not as clear as one would wish, this rule seems to imply that there must be something done by the sheriff on the land, thereby impliedly negativing the common law rule, even outside the context of *The Registration of Deeds Act*, that no seizure is necessary in the case of chattels real. The point, however, has yet to be litigated.

4. The Relevance of Seizure in Binding Land

It is clear that seizure has a different purpose in the context of execution against land than in the case of execution against goods. The purpose of seizing goods is to close a loophole. This loophole is created by the fact that, notwithstanding the fact that delivery of the execution order to the sheriff binds the debtor's interest in goods, a person who takes an interest in the goods in good faith, for valuable consideration and without notice of the writ takes free and clear of the writ. After seizure, however, ". . . the sheriff

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20 (1984), 46 Nfld. and P.E.I.R. 221 (Nfld. DC).
21 *Id.*, at 227.
22 (1988), 71 Nfld. & P.E.I.R. 226.
23 In practice, the sheriff will *post* the land. See *supra*, Chapter 1, n. 5.
24 Being schedule D to *The Judicature Act, 1986*, S.N. 1986, c. 42.

is entitled to seize the goods in the hands of the purchaser, whether *bona fide* or not."[25]

In the case of land, seizure functions differently. Elsewhere in Canada, filing the writ of execution with the sheriff or registering it at the land registry office or land titles office binds the land against any subsequent transferee, whether *bona fide* or not. There is no loophole to be closed by seizure. In this province, in the context of section 9 of *The Registration of Deeds Act*, seizure (and entry in the sheriff's books) is the event which protects the execution creditor's interest in the debtor's land as against subsequent purchasers and mortgagees.

There can be no doubt that, as a matter of both semantics and law, *seizure* does not have the same meaning in the context of execution against land as it does in the case of execution against goods. It is possible for the sheriff to take possession of goods, to carry them away. Thereafter, it is impossible for the vendor to represent to prospective purchasers that he has the right to dispose of these goods because he no longer has them in his possession.

With regard to land, however, seizure is a fiction. The sheriff cannot take possession of land as he can of goods. He cannot seize the land and remove it from the possession of the occupant, as if it were an automobile or other piece of moveable property. In practice, seizure of land means posting a copy of the execution order on some part of the property. Seizure of land, therefore, does not prevent a vendor from selling his land, but it may serve as a means of giving notice to potential purchasers that the land is bound by the execution order. In the other Canadian common law jurisdictions, this notice function is accomplished through the registration of the execution order.

The *Gough*[26] case makes clear that the use of actual seizure in section 9 is harmful to the interest of execution creditors. As discussed in Chapter 1, seizure of land in the British colonies in North America has its roots in English Imperial legislation of 1732.[27] In Dunlop's opinion, the choice of seizure in execution against land was a mistake:

> The 1732 Imperial Act which first permitted execution against land in North America took as its model the existing execution process against goods. The choice was natural enough but unfortunate because it assumed a similarity between the two types of assets which are in fact different in significant ways. More unfortunate has been the fact that most Canadian legislatures have followed the lead of the 1732 statute without considering whether or not a better or more appropriate process

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25 Dunlop, *supra*, n. 3, at 378.
26 *Gough* v. *Esso Home Comfort Centre*, (1988) 71 Nfld. & P.E.I.P. 226.
27 5 Geo. 2, c. 7.

against land should be created. One result of this unimaginative copying of the English legislation has been the continuing presence of the concept of seizure in a context where it is of doubtful usefulness.[28]

Dunlop implies that the application of the concept of seizure to the process of execution against land is an historical accident based on an unreflective tendency to treat goods and land as identical for the purposes of execution. However, while this may explain the presence of seizure in the process of execution against land *simpliciter*, it does not explain how in Newfoundland seizure came to play the peculiar role which it is given in section 9 of the *Registration of Deeds Act*. How did seizure come to play the role which it has at present in section 9? More importantly, would the abolition of seizure and its replacement by a system of registration of execution orders be an improvement?

In Newfoundland, the registration of deeds is a topic first dealt with in *The Judicature Act, 1824*.[29] The effect of sections 27-33 of that Act (which sections are reproduced in Appendix A to this Report) was to require that every deed or other assurance affecting land be registered at the registry of deeds within 6 months of execution. The deed was to be delivered to the Registrar by the party or parties from whom the interest passed. One of the parties executing the deed was required to appear before the Registrar and acknowledge the execution of the deed. Failure to observe these conditions would render the deed null and void for all purposes.

These stipulations caused a great deal of criticism. They, naturally, created problems for people who lived some distance from a registry.[30] In parts of the colony, travel was all but impossible for many months of the year. McEwen refers to a report dealing with the registration of deeds under the 1824 Act, which was submitted in 1831 to Governor Cochrane by the Judges of the Supreme Court:

> [The judges] emphasized the difficulty, amounting in some instances to impossibility, of registering within six months instruments executed in remote settlements during the winter, and they drew attention to the inconvenience and expense incurred by those who were obliged by Section 29 to travel great distances to acknowledge the execution of deeds before the registrar.[31]

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28 *Supra*, n. 3, at 408.

29 5 Geo. 4, c. 67 (U.K.). See Appendix A to this Report for sections 27-33 of the Act.

30 Under section 8 of *The Judicature Act, 1824* the Governor was authorized to divide the colony into three districts. Each district had its own registry of deeds. The three districts created were called the central, the northern and the southern districts. The Registries were located at St. John's, Harbour Grace, and Ferryland, respectively, all on the Avalon Penninsula. The Ferryland registry lasted until 1868, when it was abolished and its responsibilities transferred to St. John's. In 1883, the northern district registry was transferred from Harbour Grace to St. John's. Since that time, the only registry office has been located at St. John's.

31 A. McEwen, *Newfoundland Law of Real Property* (Unpublished Ph.D. Thesis, 1978).

A series of amendments to the 1824 Act attempted to rectify some of these shortcomings. In 1837, section 32 of the 1824 Act was repealed and, thereafter, failure to register in time or in the required manner no longer automatically rendered a deed absolutely null and void.[32] In addition, the Registrar was permitted to register deeds upon the affidavit of one of the subscribing witnesses.[33] The amending Act further provided that every deed executed after the passing of the Act would be judged fraudulent and void as against any subsequent purchaser or mortgagee for valuable consideration who had registered his deed first, unless the earlier deed had been registered within a six month time period.[34] In other words, if a vendor sold his land to one person and then later resold it to someone else, the first purchaser retained priority so long as he registered within six months of the execution of the deed, regardless of whether the second purchaser registered before the first purchaser. Once the six months had elapsed, whichever purchaser registered first took priority. The principle of giving priority to the first registered document had not, at that time, been completely established.

In 1844, further amendments were made.[35] The amending Act confirmed that deeds could be registered at any time upon the affidavit of a subscribing witness or the acknowledgement of one of the parties to the deed.[36]

In 1862, the colony passed its first Registration of Deeds Act: *An Act to Amend and Consolidate the Law now in force providing for the Registration of Deeds in this Colony, 1862.*[37] The Act repealed ss. 27-33 of *The Judicature Act, 1824* as well as the amendments of 1837 and 1844.[38] Registration no longer required a personal acknowledgement before the Registrar; an affidavit from a subscribing witness or party to the deed was sufficient. The new Act also abolished the six month time period relating to registration,[39] therewith establishing completely the principle of defeasance by prior registration.[40] Finally, and most significantly, it was in 1862 that execution creditors were, for the first time, included in the priority system.

From 1824 to 1862, a trend emerges. The 1824 Act placed very strict requirements on vendors and purchasers, requirements which failed to consider the realities of travel in Newfoundland in the early part of the nineteenth century. Over the next several decades, amendments to the 1824 Act were developed which recognized the difficulties faced by travellers in the colony. The hard conditions of travel and the consequent isolation of

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32 1 Vict., c. 5 (Nfld.).
33 S. 2.
34 S. 3.
35 7 Vict., c. 10 (Nfld.).
36 S. 1.
37 25 Vict., c. 8 (Nfld.).
38 S. 1.
39 S. 1.
40 Subject to the question of notice on the part of the prior registrant. See the discussion *supra*, Chapter 1, at 12.

communities in Newfoundland meant that most conveyancing probably took place within communities, between neighbours or among relatives without any recourse by purchasers to title searches at the Registry of Deeds.

Difficulties associated with travel may also have been compounded by problems of literacy and the lack of a genuine understanding of the function served by the Registry of Deeds. Indeed, given that most conveyances probably took place within the community, between people who were well known to one another, it is conceivable that even if people understood the purpose of a title search, they may well have been satisfied to rely on information from within the community itself as to sufficiency of the vendor's title.

The Act of 1862 took cognizance of these realities. In integrating execution priorities in the section dealing with priorities among deed holders, the legislature recognized that the registry of deeds was not being used by purchasers to search title to land.[41] A system of binding land by filing an execution order at the sheriff's office or at the registry of deeds would not, therefore, have served the function of providing information or notice to potential purchasers. A public act in the nature of *actual seizure*,[42] however, would. The arrival of the sheriff in a rural Newfoundland community in the nineteenth century would have been a significant and well-publicized event. Actual seizure, as used in section 9, can thus be seen as a response to particular historical conditions.

Are these historical considerations of continuing relevance? There can be no doubt that historical circumstances have changed. Social conditions today are not as they were in 1862. Travel is no longer the ordeal it once was. Literacy has improved and legal services are, as a rule, readily available. Communities are not as homogeneous or as static as they were with the result that conveyancing is not always between people who know one another. Even in outport Newfoundland the days when homes were built entirely from independent resources have been replaced by the realities of mortgage financing. All these factors have led to greater reliance on the registry of deeds than was the case one hundred and thirty years ago.

The conclusion to be drawn from this is that any historical ground for actual seizure that might have existed has surely disappeared. To argue in the face of changed conditions and new realities for the retention of actual seizure on the grounds that some purchasers do not search title would be to give an implicit approval to a practice which is clearly not in the public

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41 Assuming that the registration requirement was intended for this purpose and not, for example, to provide government with information on the state of private land holdings in the colony.

42 See *Hiscock* v. *Stafford*, *supra*, n. 20, where it is said that actual seizure signifies some act on the land.

interest. Indeed, the Commission is of the opinion that if abolition of actual seizure would provide a further incentive for people to search the registry of deeds, then this is another reason for so recommending. The *Gough* case vividly demonstrates the many difficulties caused by actual seizure.[43] It is a clear policy objective of *The Registration of Deeds Act* that registration of deeds should be encouraged. Abolition of seizure and its replacement by a system of registering execution orders would encourage this policy objective.

The Commission recommends:

(2) Section 9 of The Registration of Deeds Act should be amended to remove the concept of actual seizure from the procedure establishing priorities between execution creditors and subsequent purchasers or mortgagees.

43 *Supra*, n. 22.

CHAPTER 3

REFORM OF THE PRESENT SYSTEM

1. Introduction

Chapter 2 concluded with a recommendation that the concept of actual seizure be removed from section 9 of *The Registration of Deeds Act*.[1] As has already been pointed out, actual seizure (and entry in the sheriff's books) is the event which must be completed in order that the execution creditor's claim to the debtor's land be protected as against subsequent purchasers or mortgagees.

It will be remembered that the focus of section 9 is priorities. The section does not deal with the issue of the binding effect of execution orders. In other provinces, this issue is dealt with by an express statement in an Execution Act or other appropriate Act[2] to the effect that the execution debtor's land is bound upon the filing of the execution order at the sheriff's office or at the land titles or land registry office. In this province, there is no general legislative statement clearly indicating when an execution order binds land. The Commission regards the uncertainty which derives from the lack of a statement of principle such as this as highly undesireable. We believe it is essential that there be a legislative statement in this province clearly indicating when an execution order binds the execution debtor's land.

This province does not have an Execution Act. In Chapter 1 above,[3] we recommended that, in the absence of a comprehensive Executions Act, *The Judicature Act, 1986*[4] would be the most appropriate place for a provision stating that all interests in land are exigible. For similar reasons, we also believe that *The Judicature Act, 1986* would be the most appropriate place to put a provision dealing with the binding effect of execution orders. We have pointed out above that *binding* is the second of the three essential elements in any system of execution against land.[5]

The Commission recommends:

(3) *The Judicature Act, 1986* should be amended in order to add a provision which specifies the action by which an execution order shall bind land or an attachment order[6] shall attach land.

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1 R.S.N. 1970, c. 328.
2 Eg. *The Registry Act*, R.S.N.S. c. 265, s. 18
3 *Supra*, Chapter 1, at 9.
4 *The Judicature Act, 1986*, S.N. 1986, c. 42.
5 *Supra*, Chapter 1, at 1.
6 See the discussion in section 5, *infra*, at 45f. and the accompanying recommendation.

Following the practice in other common law provinces, the most obvious candidate for the event that is to constitute *binding* is registration of the execution order. As to where these orders should be registered, the alternatives would seem to be either at the sheriff's office or at the land titles or land registry office. (In Newfoundland this would mean the registry of deeds). Ontario may be used as an example here because, with its dual system of landholdings, it employs both of these alternatives.

All land in Ontario is governed either by the *Land Titles Act*[7] or the *Registry Act*.[8] Under the *Land Titles Act*, a writ of execution (writ of seizure and sale)[9] does not bind the execution debtor's land until it is received by a master of titles and recorded in the appropriate register.[10] The judgment creditor is responsible for requesting the sheriff to send a copy of the writ to the master of titles and must pay a fee for this service in addition to the charge required for filing the original writ of execution with the sheriff.[11] Sections 47(6) and 137(1) of the *Land Titles Act* explain how the process works:

> 47. (6) The title of the registered owner for the time being of land is subject to enforceable writs of execution against him that have been recorded under section 137, but no writ of execution against a prior registered owner is enforceable in respect of the land unless a note of such writ has been entered in the title register.
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> 137. (1) A sheriff to whom a writ of execution or renewal thereof is directed shall, upon receiving from or on behalf of the judgment creditor, the prescribed fee and instructions to so do, forthwith deliver to the land registrar of each land titles division wholly or partially within the sheriff's territorial jurisdiction a copy of the writ or renewal, and no registered land is bound by any writ of execution until a copy delivered by the sheriff has been received and recorded by the land registrar.

The system established for *Registry Act* land in Ontario is somewhat different. According to the *Execution Act*,[12] a writ of execution (writ of seizure and sale) binds the interest of the execution debtor in land governed by the *Registry Act* from the moment the writ is delivered to the sheriff:[13]

> 10. (1) Subject to the *Land Titles Act* and to section 11, a writ of execution binds the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution, but save as to bills of sale

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7 R.S.O. 1980, c. 230.
8 R.S.O. 1980, c. 445.
9 *Courts of Justice Act, 1984*, S.O. 1984, s. 160, c. 11.
10 S. 47(6).
11 S. 137(1).
12 R.S.O. 1980, c. 146.
13 But see section 69(11) of the *Registry Act*, R.S.O. 1970, c. 409 (now R.S.O. 1980, c. 445, s. 65(1)), which suggests that an execution creditor ought to register his writ of execution in order to protect his interest from subsequent purchasers and mortgagees. See the discussion of this matter in the Ontario Law Reform Commission's *Report On the Enforcement of Judgment Debts and Related Matters*, Part III (1981), at 75 (especially n. 9).

and instruments in the nature of chattel mortgages, no writ of execution against goods prejudices the title to such goods acquired by a person in good faith and for valuable consideration unless such person had, at the time when he acquired his title, notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached has been delivered to the sheriff and remains in his hands unexecuted.

Which of these alternatives is preferable? Under the present system in Newfoundland, the execution order is filed only with the sheriff. Should filing with the sheriff be sufficient to bind the property? There are two problems with this alternative. First, this is not the most efficient system. The person searching title will still have to check the registry of deeds. It would be much simpler and less costly to store as many as possible of the documents affecting land in the same repository. Second, not only would this be a more efficient system, but it would also be in accord with the policy that all documents affecting land should be located in the same place. This policy underlies *The Registration of Deeds Act*.

Filing the execution order or attachment order with the registry of deeds is the most efficient way of binding the land. There is, however, a problem with this approach. In a province such as Newfoundland, which has no Creditor's Relief Act, the execution creditor's right to share in the assets of the execution debtor is determined according to the common law rule of *first in time, first in right*.[14] The date on which the execution creditor's order binds the execution debtor's assets determines where the execution creditor will rank *vis a vis* other execution creditors.[15] Under the present system, the ranking of priorities as amongst execution creditors is within the knowledge and control of the sheriff, who seizes the land according to the sequence in which the execution orders are delivered to him.[16] Therefore, in contests between execution creditors, the first person to deliver his execution order to the sheriff with instructions to seize will have first claim to the assets of the debtor.

If the execution order were to bind upon registration at the registry of deeds, the process would be outside of the sheriff's knowledge and control. How would the sheriff know whether the execution process has begun or in what order the execution creditors are entitled to share in the execution debtor's assets? Ontario's *Land Titles Act* resolves this issue by having the sheriff deliver a copy of the writ of execution to the land titles office for registration. The Commission rejects this idea because we are of the opinion

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14 C. Dunlop, *Creditor-Debtor Law in Canada* (1981), at 414.

15 As previously noted, there is no legislation in this province dealing with the question of when an execution order binds land. The sheriff's practice, however, is to award priority to the first creditor who files an execution order with instructions to seize a specific parcel of the debtor's land.

16 See Rule 51.08 of the *Rules of the Supreme Court, 1986*, S.N. 1986, c. 42, Schedule D:
51.08 (1) The sheriff, having several execution orders to seize the same property, shall seize the property in the sequence in which the orders were received by the sheriff.

that the sheriff's office, in this province, does not have the resources to ensure prompt delivery of execution orders to the registry of deeds.

What is needed is some way to separate priorities as between execution creditors and subsequent purchasers, on the one hand, and as amongst execution creditors themselves, on the other hand. We are of the view that this result is achieved if the execution order binds the land upon filing with the sheriff, but is made subject to defeasance as against a purchaser, mortgagee or other transferee of an interest in land under an instrument if the instrument is registered at the registry of deeds before the execution order is registered. This compromise has two results:

(1) priorities among execution creditors remain under the control of the sheriff, while priorities between an execution creditor and an instrument holder are determined at the registry of deeds; and

(2) a person searching title need only check the registry of deeds in order to determine if the property being searched is bound by an execution or attachment order.

The Commission recommends:

(4) *The Judicature Act, 1986* should be amended to provide that the interest of a debtor in land, as well as the interest in land of any purchaser, mortgagee, or other transferee from the debtor under an instrument, shall be bound by an execution order or attached by an attachment order[17] from the time of delivery of the order to the sheriff.

(5) *The Judicature Act, 1986* should be amended to provide that notwithstanding the delivery of an execution order or attachment order[18] to the sheriff, no such order shall prejudice the title of any purchaser, mortgagee or other transferee of an interest in land from the debtor under an instrument who has registered his instrument at the registry of deeds before the registration of such order.

2. Ten Day Delay

It has been recommended that actual seizure be replaced by a system of registering execution orders at the registry of deeds. This recommendation by itself, however, would work a hardship on purchasers and solicitors from outside St. John's. At present, given the slowness of the process of actual seizure, a solicitor in Corner Brook who has had a search made of the sheriff's and sub-sheriff's offices just prior to closing and who has discovered

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17 See *supra*, n. 6.
18 *Ibid.*

no execution orders can send his deed to St. John's with some, but not absolute, confidence that it will be registered before any execution process begun subsequent to the search of the sheriff's office has reached the point of actual seizure and entry in the sheriff's books.

Given the requirement for the sheriff to post the execution debtor's land, a Corner Brook purchaser and his solicitor, for example, can cope with the problems created by the fact that *Jellett* v. *Wilkie*[19] does not apply in this province and that the only registry of deeds for the province is in St. John's. If actual seizure is replaced by a registration system, the Corner Brook purchaser and his solicitor face the real possibility that the purchaser's deed will be defeated by an execution order registered in the time between the final search of the sheriff's office and the registration of the deed at the registry of deeds.

There are several possible ways of resolving this difficulty. The simplest would be to restore the rule in *Jellett* v. *Wilkie*. If this were done and if at the time of closing no execution orders had been registered at the registry of deeds,[20] a deed of conveyance could be delivered to the registry of deeds with no fear that it might be defeated by a creditor of the vendor with a prior claim to the land.

It is not the recommendation of this report, however, that the rule in *Jellett* v. *Wilkie* be restored. In the Commission's discussion of this issue, opinion was divided as to the desirability of such a recommendation. On the one hand, the restoration of the rule in *Jellett* v. *Wilkie* would clearly resolve some of the problems faced by solicitors and their clients from outside St. John's. On the other hand, the Commission agreed that such action would entail unacceptable consequences. The Commission accepted the argument that the rule in *Jellett* v. *Wilkie* would not work successfully in a system which did not have registry closings. A registry closing fixes the date of the deed's execution; it is signed, sealed, and delivered. There is little opportunity for a fraud to be perpetrated against an execution creditor by back dating a deed. If *Jellett* v. *Wilkie* were restored without the practice of registry closings also being implemented (which is impractical given the fact that the province's only registry is in St. John's), whenever a deed is registered after an execution order, but executed, apparently, before the registration of the execution order, the question will arise as to whether the deed was actually executed before the registration of the execution order. The Commission concluded that, by itself, the reinstatement of *Jellett* v. *Wilkie* would lead to uncertainty and serve only to create unproductive litigation.

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19 (1896), 26 SCR 282.

20 And the purchaser has had no notice of a prior execution order in the hands of the sheriff.

The solution which the Commission tentatively recommends as a long term measure is the registration of facsimile copies of deeds. This would have the effect of speeding up the time of delivery of the deed to the registry; it could be registered almost immediately after execution. However, at the present time, the registry of deeds will accept for registration only the original deed.

A number of objections might be made to the suggestion that faxed deeds be registered. In the first place, it might be thought that there is a greater scope for fraud with faxed deeds. This assumes that requiring the registration of the original document is a deterrent to fraud. However, under the present system, the registry personnel accepting the deed for registration check only whether the formalities of execution have been completed. The substance of the deed is not questioned. Current registration procedure is not designed to detect fraud. As to whether allowing faxed deeds to be registered would give greater scope for fraud is a matter on which there is no evidence; it is, therefore, too speculative a basis on which to make a decision.

A second argument deals with a more technical consideration. All deeds and other documents accepted for registration at the registry of deeds are microfilmed. The original document is returned and the microfilmed copy is kept for the public record. The document produced from a fax machine is not a perfect copy of the original. There is a noticeable loss of quality when compared with the original document. Is a faxed document suitable for microfilming? This is one question which must be resolved before the Commission can give its unreserved approval to the proposal.

Although registration by fax is regarded as the long-term solution to the uncertainties faced by purchasers and solicitors who do not have easy access to the registry of deeds, the Commission also proposes a short-term solution. It is recommended that the execution order not take priority over subsequently registered deeds until ten days after registration. In other words, although registered subsequent to the execution order, a purchaser's deed would not be defeated if it were registered within ten days of the registration of the execution order.

The Ontario Law Reform Commission recommended,[21] as one of its short term proposals, that the binding effect of a writ of execution be delayed until 10 days after delivery to the sheriff or master of titles, as the case may be.[22] The problem which the Ontario Law Reform Commission's propoal sought to address is not directly applicable to the Newfoundland situation.

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21 *Report on the Enforcement of Judgment Debts and Related Matters, Part III (1988)*, at 117-119.

22 It should be noted that the proposal here discussed does not recommend delaying the *binding effect* of the execution order, but its priority over subsequently registered deeds.

There is, however, a sufficient similarity between the situations in Ontario and Newfoundland to merit an examination of Ontario's position.

In Ontario, delivery of a writ of execution to the sheriff will bind all the debtor's *Registry Act* land in the sheriff's bailiwick.[23] A further delivery of the writ to the land titles office is required in order to bind any of the debtor's land in the geographical area of the land titles office that is governed by the *Land Titles Act*.[24] Unlike Newfoundland, Ontario is divided into a number of bailiwicks and land registry and land titles divisions. Ontario, furthermore, has a practice of registry closings.

The fact that in Ontario a writ of execution binds the debtor's lands after it has been received at the appropriate office means that a sub-search for execution orders must be made just prior to closing. Any writs discovered on a sub-search will likely delay the closing and/or increase the cost of the conveyance. It was to avoid these last minute delays that the Ontario Law Reform Commission proposed that the binding effect of a writ of execution against land be delayed until ten days after receipt at the appropriate office.[25]

Although the Newfoundland situation is not identical to that of Ontario, it can, in fact, be argued that the reasoning of the Ontario Law Reform Commission applies with even greater force in this province. The Ontario Law Reform Commission's recommendation is based on considerations of convenience and efficiency. Having to resolve these last minute problems is a nuisance. In Ontario, however, it is only that. In Newfoundland, the situation is different. Here, if an execution order were to take priority immediately upon registration, the solicitor outside St. John's who sends his deeds to the registry would be at the mercy of any creditor who registered his execution order in the time between execution of the deed and its registration. It is not a question of a solicitor suffering the inconvenience of having to resolve problems identified at the last minute; rather, a solicitor outside of St. John's is not even in a position to identify the problem. Equity demands that there be some reasonable period during which a prior registered execution order is subject to defeasance by a subsequently registered instrument. The Commission takes the position that ten days is a reasonable time period to delay the priority effect of a registered execution order as against a subsequently registered instrument.

It will, perhaps, be objected that an opportunity for fraud will arise if an execution order does not take priority immediately upon registration. The debtor will have ten days after judgment to dispose of his property. The ten day delay, it can be argued, would be a bonus to those debtors who might try to defeat their creditors.

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23 *Execution Act*, R.S.O. 1980, c. 146, s. 10(1).
24 *Land Titles Act*, R.S.O. 1980, c. 230, s. 137(1).
25 Ontario Law Reform Commission, Report, *supra*, n. 21, at 117-118.

It is questionable, however, whether a fraud could be perpetrated so easily. Even though a deed of conveyance could be drafted and executed well within the ten-day period, what of the other documents that are part of a legitimate conveyance, such as offers to purchase, agreements of purchase and sale, correspondence between solicitors, etc.? This documentation would be absent from the conveyance cooked up on short notice. A conveyance in these circumstances would show the characteristic marks of fraud and an action to set aside the conveyance under *The Fraudulent Conveyances Act*[26] would be appropriate.

The Ontario Law Reform Commission also dealt with the objection that a ten-day delay would encourage fraud. Its argument is worth quoting at some length:

> The commission acknowledges that the above proposal may cause some prejudice to judgment creditors by permitting a debtor's land to remain free of the rights of his execution creditors during the proposed ten day delay period . . . . [W]e believe that the substantial benefits to conveyancing outweigh any prejudice to creditors, particularly since these benefits will accrue mainly to innocent persons having no connection with the judgment debtor. The contention that creditors may be harmed by the proposal should be viewed in perspective. In many cases, a substantial period of time intervenes between the date of the commencement of a creditor's action and the date of judgment. Therefore, a debtor who desires to make himself judgment proof will have considerable time to do so before judgment or before the issuance and filing of the writ. There seems to be little cause for concern that an additional ten days will alter dramatically the intentions of the debtor. Moreover, creditors would be protected in part by their ability to seize the proceeds of a transaction effected within the delay period, and could attack and set aside transactions that were entered into for the purpose of delaying or defrauding creditors. Since creditors generally reap the benefit of the existing system in which purchasers and lenders search for and report the existence of property owned by debtors and provide an effective and inexpensive means of satisfying execution claims, it appears to us to be justified to limit the rights of creditors slightly so that the prejudice to purchasers and lenders can be reduced significantly.[27] [Footnote omitted]

The purpose of the ten-day delay is to protect honest purchasers and mortgagees. It is intended to alleviate problems whose cause is outside the control of the purchaser or his solicitor. The length of time needed to transmit documents from one part of the province to another is a fact which neither a purchaser nor his lawyer can control. The ten-day delay ought not to benefit the purchaser who has had notice that the land which he is purchasing is bound by an execution order prior to the execution of the deed of conveyance. It is therefore reasonable to suggest that the ten-day delay period not apply

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26 S.N. 1974, c. 29.
27 *Report*, *supra*, n. 21, at 118.

in the case of any purchaser or mortgagee who has had actual notice of the execution order before the execution of his deed. Where actual notice exists, the purchaser should not get the benefit of the ten-day delay period.

The Ontario Law Reform Commission dealt with the question of notice in discussing the desirability of a ten-day delay and came to the opposite conclusion:[28]

> [A]doption of an "actual notice" provision could give rise to considerable litigation, with difficult evidentiary problems serving to complicate matters.

This Commission recognizes that its proposal to withhold the benefit of the ten-day delay from purchasers and mortgagees with actual notice may cause increased litigation. However, we have seen no evidence to suggest that the Newfoundland courts would be unduly burdened. Furthermore, the question of proof must be in the mind of anyone contemplating litigation. A creditor who believed that a purchaser has had notice would have to decide whether this could be proven in a court of law. It is one of a lawyer's responsibilities to advise his client whether the prospects of success are sufficiently high to warrant the costs of litigation. The difficulty of proving actual notice may restrain creditors from pursuing fruitless litigation.

The Commission recommends:

(6) *The Registration of Deeds Act* and *The Judicature Act, 1986* should both be amended to provide that, notwithstanding the registration of an execution order or attachment order[29] at the registry of deeds, no such order shall prejudice the title of any purchaser, mortgagee or other transferee of an interest in land from the debtor under an instrument who has registered his instrument at the registry of deeds within ten days of the registration of the order in the registry of deeds, except in the case of a transferee who has had actual notice of the order prior to the execution of his instrument.

We have indicated above that the Commission's recommendation of the ten-day delay period is based on the fact that it is intended to be a short-term solution. In the long term, it is hoped that a system of registration by fax will be implemented.

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28 *Id.*, at 119.
29 See *supra*, n. 6.

3. General vs. Specific Lien

Since the introduction of *The Judicature Act, 1986*,[30] there has been some question as to whether an execution order operates as a general lien[31] or as a specific lien. In other words, does an execution order bind all of a judgment debtor's assets or just those assets which the execution creditor specifies in his instructions to the sheriff.[32] This is a question which has never been decided by a Court in this province. Further, as has already been mentioned, there is, in Newfoundland, no legislation dealing generally with the nature and effect of an execution order.

Whatever the effect generally of an execution order, it is clear that section 9 of *The Registration of Deeds Act*[33] deals with individual parcels of land. The section refers to land that has been *actually seized*. In *Gough* v. *Esso Home Comfort Centre*,[34] the Court stated that, with respect to actual seizure "[t]here must . . . be some positive act by the sheriff which makes it clear to all that he has taken possession of the land."[35] Clearly, this can only refer to individual parcels of land, and the closing words of section 9 support this interpretation:

> [S]uch attachment, *with a description of the property attached,* shall be entered by the sheriff in his office books immediately after such attachment shall be executed and duly registered. (Emphasis added.)

We have recommended above that a debtor's land be bound upon delivery of the execution order to the sheriff. What should the effect of that order be? Should it bind all of the debtor's land or should it bind only specifically indicated parcels of land?

If a general lien system were adopted, a creditor would simply file his execution order with the sheriff and all of the debtor's land would be bound. As the execution order would apply to all of the debtor's land, the only information about the debtor which need be in the execution order would be the debtor's name. No particular piece of the debtor's property need be identified in the execution order. To protect his interest in the debtor's land from subsequent purchasers and mortgagees of the debtor, the creditor would also, of course, be required, in accordance with the reform recommendations made above, to register his execution order at the Registry of Deeds and await the expiration of the ten-day delay period.

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30 S.N. 1986, c. 42.
31 The word *lien* is used only for convenience and is not intended to say anything about the precise nature of an execution creditor's interest in his debtor's land.
32 For a discussion of the question, see *Newfoundland Law Reform Commission, Summary of Round Table on Executions*,IWD1 (1987), at 5-13.
33 R.S.N. 1970, c. 328.
34 (1988), 71 Nfld. & P.E.I.R. 226 (Nfld. C.A.).
35 *Id.*, at 230.

On the other hand, if a specific lien system were adopted, the execution creditor would have to locate a parcel of the debtor's land before it could be bound. The creditor would then file with the sheriff an execution order, together with a description of the land to be bound. To protect his interest in the debtor's land, the creditor would also register his execution order with its appended description at the registry of deeds and hope that no subsequent purchaser or mortgagee registered an instrument affecting the land within the ten-day delay period.

Which of these alternatives is preferable? From the creditor's point of view, a general lien is more advantageous. The creditor does not have to locate the debtor's property before it can be bound by the execution order.[36] This saves time and money. Furthermore, filing with the sheriff and registration at the registry of deeds can be accomplished shortly after judgment has been entered.[37]

A specific lien, by comparison, has several disadvantages for the creditor. As the creditor may only bind specifically identified land, the first problem for the creditor is to find some of the debtor's land. Unless the creditor has already conducted searches for the debtor's property before judgment has been entered, it may be some time before he is able to file and then register his execution order. Within the period between the date of judgment and the expiration of the ten-day delay period, might not the debtor dispose of his land in order to defeat his creditors?[38] In a general lien system, the creditor is able to register the order as soon as it has been granted, though he still must wait for the ten-day delay period to expire.

A further problem with the specific lien system as outlined here is that the creditor would be required to file a description of the land to be bound together with the execution order. In some cases, it may be difficult to provide an adequate description of the land. Newfoundland has a deed registry system, not a land titles system. There is no registry of land holdings in the province.

For the more urbanized areas of the province, the lack of a registry of land holdings is not a serious problem. The conveyancing practice in these areas is to attach, as schedules to the deed, a surveyor's plan of the land and a legal description. The creditor need only check the registry of deeds, copy

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36 However, the creditor will have to locate some of the land if he intends to sell it in order to satisfy the debt.

37 Here, again, the ten-day delay would reduce the general lien's value to a creditor.

38 Of course, *The Fraudulent Conveyances Act, 1974*, S.N. 1974, c. 29, can be invoked against a debtor who has disposed of his land in order to avoid paying his debts. However, Dunlop, *supra*, n. 14, at 521-525, points out that there may be difficulties in proving the fraudulent intent of the parties where consideration has been given for the property. It is by no means certain that an action to set aside the conveyance would be successful. The discussion, *supra*, at 33f, in the context of the ten-day delay is relevant here.

the surveyor's plan and legal description from a registered deed and file these with the execution order.

Outside the few urban areas of the province, the situation is more complicated. Much land is undeveloped and, indeed, has never been surveyed. If a deed to the land has been registered, it is likely to contain a very inadequate description of the land. The creditor may well have to visit the land and make his own rough description.

But the general lien, as herein described, has problems of its own. A general lien creates problems both for parties involved in the conveyancing system and for execution creditors. With respect to the latter, it may seem paradoxical to suggest that a general lien system could inconvenience execution creditors. It might be thought that a general lien system would be the system most favourable to execution creditors. However, under this province's execution system, a general lien is of benefit only to the execution creditor who has priority as against other execution creditors.

The reason for this has been adverted to obliquely in Chapter 1 above.[39] The *Rules of the Supreme Court, 1986* were modelled substantially upon the existing Nova Scotia Rules of Court. In that province the practice and procedure set forth in the rules governing execution against land receives substantive legislative support in a *Sale of Land Under Execution Act*.[40] Sections 7 and 8 of that Act deal with the situation where a prior creditor refuses to take action to sell the debtor's land. The subsequent creditor, upon giving notice to the prior creditor, can require the prior creditor to sell the debtor's land within three months or lose his priority.[41]

Since this province does not have any legislation equivalent to *The Sale of Land Under Execution Act*, if a general lien system were adopted, a debtor might be able to take advantage of the situation. A debtor who found himself being threatened by his creditors might attempt to block any execution process by having an accomplice take out a judgment against the debtor, file the execution order and then fail to act on it. The execution order, acting as a general lien, would cover all of the debtor's assets thereby preventing creditors from executing against the debtor.

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39 *Supra*, Chapter 1, at 6f.
40 R.S.N.S. 1969, c. 275.
41 Sections 7 and 8 of Nova Scotia's *Sale of Land Under Execution Act*, R.S.N.S. 1969, c. 275, are reproduced in Appendix A to this Report.

Apart from the potential for fraud, there is also the question of the efficiency of such a system. Subsequent creditors would have little incentive to search out the debtor's property unless they were satisfied that there was property of sufficient value to cover their claim as well as the claims of prior creditors.[42] A general lien system might well operate so as to reduce the efficiency of the execution system.

Furthermore, creditors who were prevented from pursuing a remedy through the execution process might well seek other solutions. One such solution would be bankruptcy proceedings. A creditor who was unable to satisfy his claim through the execution process might well petition his debtor into bankruptcy in order to secure a more favourable distribution of the debtor's assets. Thus, a possible increase in bankruptcies might well be an undesirable side effect of the adoption of a general lien system.

In addition to creating problems for the execution system, a general lien would also have a potential adverse affect on the conveyancing system. The problems which a general lien creates for the conveyancing system center around the so-called similar name problem. In a general lien system, the only information which is essential to the lien document is the execution debtor's name.[43] Therefore, in a real estate transaction, a sheriff's search may turn up several execution orders against people whose names are very similar to the vendor's. In a specific lien system, by comparison, one need only check the description of the property in the execution order to determine whether the execution order binds the land in question.[44]

The similar name problem, which is inherent in a general lien system, can be viewed from two perspectives: that of the purchaser who is trying to determine whether the vendor is the subject of an execution order, and that of the person whose name is similar to a execution debtor.

From the point of view of the purchaser, resolution of the similar name issue can be a very real practical problem. A purchaser may have to track down a great number of execution orders in order to determine whether any of them bind the vendor's property. Because a general lien system ties the execution order to the vendor's name and not to an identifiable piece of

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42 Section 41 of Nova Scotia's *Creditors' Relief Act*, R.S.N.S. 1967, c. 70, excludes from the Act proceeds realized by land execution. Moneys realized by land execution are thus distributed according to the order of filing the writs. This has the effect that the creditor in the priority position for the time being, as determined by *The Sale of Land Under Execution Act*, will exercise his best efforts to find property, or risk getting nothing by being pushed to the bottom of the list by the process provided for in sections 7 and 8 of that Act.

43 See, for example, the *Execution Act*, R.S.O. 1980, c. 146, s. 11(1):
11.(1) Where the name of an execution debtor set out in a writ of execution is not that of a corporation or the firm name of a partnership, the writ does not bind the lands of the execution debtor unless,
(a) the name of the execution debtor set out in the writ includes at least one given name in full; or
(b) a statutory declaration of the execution creditor or his solicitor is filed with the sheriff identifying the execution debtor by at least one given name in full.

44 Assuming that the description is adequate.

land, the similar name problem is aggravated, conveyancing is delayed and its cost increased.

The general lien, with its consequent similar name problem, also affects the person whose name is similar to an execution debtor. Problems may arise when, for example, such a person attempts to sell his house. The purchaser will likely not close the transaction until he is assured that the property being purchased is not bound by an execution order. The innocent vendor, therefore, will have to incur extra costs in contacting the creditor and getting an affidavit or some other satisfactory assurance that the vendor is not the debtor. The benefit which the general lien gives to the creditor comes at the expense of people who have nothing to do with the creditor.

The Ontario Law Reform Commission pointed out[45] that by tying the execution system to the conveyancing system, the general lien shifts the burden of collecting the debt from the creditor to the conveyancing system as a whole. Because of the similar name problem, the innocent vendor will be burdened with the cost of proving that his land is not bound by an execution order.

The Ontario Commission took the position that creditors themselves should bear the costs of collecting their debts and therefore recommended that the general lien be abolished and that writs of execution be registered against specific parcels of the debtor's land.[46] This Commission agrees with the reasoning underlying the Ontario recommendations. We are of the opinion that a general lien system unfairly distributes the burden of collecting the execution debt. The benefits to the execution creditor of a general lien system do not justify burdening parties who are not part of the debtor-creditor relationship.

There is, however, another possibility. A hybrid system combining elements of the general and the specific lien is theoretically possible. The reason for this is that the question of *binding* is separate from that of defeasance for purpose of section 9. As discussed throughout this report, binding deals with the issue of priorities as among execution creditors. Section 9 deals with the question of priorities as between execution creditors and subsequent purchasers and mortgagees.

A system could be constructed which separated these two sets of priorities. As among execution creditors, an execution order could operate as a general lien at the sheriff's office, and the common law with respect to priorities would apply. Under section 9, a creditor would be required to file a description of a particular piece of the debtor's land at the registry of deeds in order to protect his interest in that land as against subsequent purchasers

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45 Report, *supra*, n. 21, at 113-114.
46 *Id.*, at 114.

and mortgagees. A hybrid system along these lines would answer those criticisms which dwell upon a general lien's effect on the conveyancing system. However, it would not resolve those problems which a general lien, in the absence of a *Sale of Land Under Execution Act*, creates for subsequent creditors: only a specific lien system as hereinbefore described could do that.

It must be remembered that this province has always operated under the assumption that it has a specific lien system. Those involved in the execution process are familiar with the concept of an execution order as a specific lien. In the Commission's discussion with senior members of the Bar on the topic of execution law, strong opposition was expressed by several participants against the view that an execution order should operate as a general lien.[47] In view of these comments and in the absence of the other legislation necessary to undergird a general lien or a hybrid system, the Commission does not favour the adoption of a general lien system or the off-shoot hybrid system. It is our position that retention of the specific lien would cause the least amount of disruption in the existing system. In the future, however, in the context of more sweeping change, it might well be that a revisiting of this issue would be warranted, indeed necessary.

The Commission recommends:

(7) *The Judicature Act, 1986* should be amended to provide that an execution order will bind and an attachment order[48] will attach only specified portions of the debtor's land.

4. Description of the Property/Identifiers

An execution order will bind only individual parcels of the debtor's land. When an execution order is filed with the sheriff, the creditor will have to append to it a description of the property to be bound. How detailed should such a description be? If a description is available from the registry of deeds, it is to be expected that the creditor will use that. With regard to land for which no description can be found or where the available description is inadequate, a rough description is all that can be expected. In all circumstances, however, the description should be sufficient to identify the property to a reasonable person.

It may well happen that an execution order will misdescribe the execution debtor's property or that an execution debtor's name will be mispelled. Should an execution order be rendered invalid for such errors or omissions? In Ontario, section 11 of the *Execution Act* has just this effect:[49]

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47 Newfoundland Law Reform Commission, *Summary of Round Table on Executions*, *supra*, n. 32, at 4ff. These criticisms were made from the point of view of the execution creditor.

48 See, *supra*, n. 6.

49 R.S.O. 1980, c. 146.

11. (1) Where the name of an execution debtor set out in a writ of execution is not that of a corporation or the firm name of a partnership, the writ does not bind the lands of the execution debtor unless,

(a) the name of the execution debtor set out in the writ includes at least one given name in full; or

(b) a statutory declaration of the execution creditor or his solicitor is filed with the sheriff identifying the execution debtor by at least one given name in full.

(2) Subject to subsection (3), where a statutory declaration is filed under clause (1)(b), the name of the execution debtor set out in the writ shall be deemed to contain the given names affirmed in the declaration and the writ binds land from the time the declaration is filed.

(3) Where a statutory declaration is filed under clause (1)(b) in respect of a writ of execution of which a copy has been transmitted to the proper land registrar under section 137 of the *Land Titles Act*, the sheriff shall transmit a copy of the declaration to the proper land registrar and the writ does not bind land registered under the *Land Titles Act* until the copy of the declaration has been received by the proper land registrar.

According to the Ontario Law Reform Commission, section 11 was enacted to resolve the difficulties caused by the similar name problem.[50] Ontario, as previously noted, has a general lien system, and in such a system the similar name problem is much more serious than in a specific lien system such as exists in Newfoundland.[51]

Regardless of the fact that Newfoundland does not have a general lien system, the Commission is reluctant to see an execution order invalidated on a mere technicality unless a purchaser, mortgagee or other transferee of an interest in the debtor's land under an instrument has been prejudiced by the error or omission. The multiplication of such conditions will almost certainly lead to some execution orders being invalidated on purely technical grounds. Section 21 of *The Bills of Sale Act*[52] reflects the general approach favoured by the Commission:

21. A document to which this Act applies shall not be invalidated or its effect destroyed by reason only of a defect, irregularity, omission or error therein or in the execution or attestation thereof unless, in the opinion of the court or judge before whom a question relating thereto is tried, the defect, irregularity, omission or error has actually misled some person whose interests are affected by the document.

The Commission recommends:

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50 *Report*, *supra*, n. 21, at 86.
51 See the discussion, *supra*, at 40f.
52 R.S.N. 1970, c. 21.

(8) *The Judicature Act, 1986* should be amended to provide that an execution order or attachment order[53] shall not bind nor attach the land of a debtor unless the order has appended to it a description of the land to be bound or attached that is sufficient to identify the property to a reasonable person.

(9) *The Judicature Act, 1986* should be amended to provide that an execution order or attachment order[54] shall be subject to invalidation on the grounds of an error or omission in the order only if the error or omission has actually mislead a purchaser, mortgagee or other transferee of an interest in land from the debtor under an instrument and only if such error or omission would have mislead a reasonable person.

5. Attachment Orders

To this point, the discussion has centered on execution orders. Section 9 of *The Registration of Deeds Act*,[55] however, refers to "any creditor who shall have actually seized or levied under *attachment* or execution." (Emphasis added.) Attachment orders are included in the present section 9 together with execution orders. Should attachment orders be registerable under the proposed new system?

An attachment order is a pre-judgment remedy. The grounds upon which an attachment order will be granted are listed in Rule 28.02(1) of the *Rules of The Supreme Court, 1986*:[56]

> Grounds of application for attachment order
>
> 28.02(1) Where a defendant, or a principal shareholder of a corporate defendant,
>
> (a) resides out of the jurisdiction, or is a corporation or company that is not registered under *The Companies Act*[57] or is not a corporation created by any statute or law of the Province of Newfoundland;
>
> (b) conceals himself, herself or itself or absconds within the jurisdiction with intent to avoid service on him, her or it of any document;

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53 See, *supra*, n. 6.
54 Ibid.
55 R.S.N. 1970, c. 328.
56 S.N. 1986, c. 42, Schedule D.
57 See, *The Corporations Act*, S.N. 1986, c. 12, s. 521(2):
521(2) A reference in an unrepealed enactment to *The Companies Act* must, as regards a transaction, matter or thing subsequent to the commencement of this Act, be construed and applied, unless the context otherwise requires, as a reference to the provisions of this Act that relate to the same subject-matter as the provisions of *The Corporations Act* referred to in the unrepealed enactment; but if there are no provisions in this Act that relate to the same subject-matter, *The Companies Act* must be construed and applied as unrepealed in so far as it is necessary to maintain or give effect to the unrepealed enactment.

(c) is about to leave or has left the jurisdiction with intent to change his or her domicile, defraud his or her creditors, or avoid service of a document;

(d) is about to remove or has removed his, her or its property or any part thereof permanently out of the jurisdiction;

(e) *has concealed removed, assigned, transferred, conveyed, converted or otherwise disposed of all or any part of his, her or its property with intent to hinder or delay his, her or its creditors, or is about to do so;* or

(f) has fraudulently incurred a debt or liability in issue in a proceeding,

a plaintiff may, at or after the commencement of the proceeding and before judgment has been entered and as an incident of the relief claimed, make application for an attachment order in Form 28.05A. (Emphasis added)

One of the purposes of an attachment order, as stated in R 28.02(1)(e), is to ensure that a debtor will have assets within the jurisdiction of the Court sufficient to satisfy a judgment. Like the post-judgment execution order, the pre-judgment attachment order prevents a debtor from disposing of his land free from the claims of a creditor. Both execution orders and attachment orders affect the conveyancing of land. If execution orders are to be registerable, it follows, for the same reasons, that attachment orders ought to be registerable as well.[58]

The Commission recommends:

(10) *The Judicature Act, 1986* should be amended to provide that attachment orders as well as execution orders shall be accepted for registration at the registry of deeds.

6. The Form of the Documents to be Registered

If a registration system for execution orders and attachment orders is to be put in place, what kind of documents are to be registered?[59] In the previous discussion, it was assumed that the execution orders and attachment orders themselves are to be registered at the registry of deeds. This is the simplest arrangement and is in line with the policy of *The Registration of*

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58 The accomodation of attachment orders within the scope of the Commission's recommendations will require some amendments to the *Rules of the Supreme Court, 1986*. See, *infra*, section 8.

59 As the execution orders and attachment orders will be delivered to the sheriff, the question is whether these orders ought also to be the documents registered.

Deeds Act, which is to register the actual legal document itself and not a memorandum or record of the document.

However, since the original of the execution order or attachment order will be needed by the sheriff in order to serve the debtor,[60] the document to be registered at the registry of deeds will be a copy.[61] The copy of the order ought, however, to be certified by the sheriff's office as to the time of receipt: (1) in order to establish priorities among execution creditors to the assets of the execution debtor and (2) as evidence that the order has been received at the sheriff's office.

The Commission recommends:

(11) *The Judicature Act, 1986* should be amended to provide that the registry of deeds shall accept for registration copies of execution orders and attachment orders which have been certified by the sheriff as to the time of receipt at his office and that the copies are true copies.

It is rather more difficult to decide what kind of document should be registered when the order has been satisfied or is otherwise no longer effective. One choice would be the so-called *satisfaction piece*. A satisfaction piece is a document from a creditor indicating that his judgment has been satisfied. It is analogous to a release of a mortgage, which is a document routinely registered at the registry of deeds.

The objection to the use of satisfaction pieces is that they are documents of limited application. As well, circumstances may exist where an unsatisfied judgment creditor would obviously not be prepared to give a satisfaction piece but would nevertheless be prepared to release a particular piece of land from an execution order.[62] What is needed is a document which has greater flexibility and can be used in all situations where land is being released from an execution order or attachment order: a document which should be called a *certificate of release*.

If a certificate of release is to be registered at the registry of deeds in order to give notice of the release of the debtor's property from the execution or attachment order, the obvious person to issue such a document is the sheriff. The order has to be delivered to the sheriff in order to have effect against the debtor's land. Execution and attachment are carried out by the sheriff. Furthermore, as filing the order with the sheriff will bind or attach

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60 See Rule 6.01 of the *Rules of the Supreme Court, 1986*, *supra*, n. 56:
6.01 (2) Service of a true copy of a document shall be service of the original document, but if the person served so requests, that person shall be shown the original document or a copy thereof certified as being a concurrent or true copy by the Registrar or by the commissioner in the case of a statement of claim issued by him or her.

61 Assuming that the registry of deeds will retain the registered document.

62 An example would be the situation where a judgment creditor considers other land also subject to an execution order to be of sufficient value to satisfy the debt.

the debtor's land, it seems reasonable that the sheriff issue the document which releases it.

It should be pointed out, however, that, in some circumstances, the sheriff may refuse to issue a certificate of release on his own accord. The sheriff should not make such a refusal except on reasonable grounds, but in the event of such refusal, the person who requested the certificate should be able to make an application to the Trial Division of the Supreme Court for an order directing the sheriff to issue a certificate.

The Commission recommends:

(12) *The Judicature Act, 1986* should be amended to provide that upon the issuing of a certificate of release, an execution order or an attachment order filed with the sheriff shall cease to bind or to attach the land.

(13) *The Judicature Act, 1986* should be amended to provide that any person with an interest in land bound or attached by an execution order or attachment order may apply for a certificate of release.

(14) *The Judicature Act, 1986* should be amended to provide that the registration of a certificate of release shall render ineffective a registered execution order or attachment order.

(15) *The Judicature Act, 1986* should be amended to provide that in the event that the sheriff refuses to issue a certificate of release, the person who requested the certificate may make an application to the Trial Division of the Supreme Court for an order directing the sheriff to issue the certificate.

(16) *The Judicature Act, 1986* should be amended to provide that the sheriff shall issue a certificate of release upon the request of a creditor (provided all costs of execution or attachment have been paid), and in all other cases the sheriff shall not refuse to issue a certificate of release except on reasonable grounds.

7. Release of an Execution Order or Attachment Order

A. Execution Orders

In the last section, it was recommended that an execution order or attachment order registered at the registry of deeds cease to be effective upon the registration of a certificate of release. Should the registered order also be subject to a time limit? In all Canadian jurisdictions, statutory time limits have been established for the validity of a writ of execution.[63] With the

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63 Dunlop, *supra*, n. 14, at 371.

exception of Saskatchewan, all provinces have created procedures for the renewal of a writ.[64] Most provinces maintain separate and different time limits for judgments or writs filed in a land registry or land titles office.[65]

In the Commission's view, there is no reason to maintain two different time periods. An execution order registered at the registry of deeds, provided that its registration is renewed, should continue to remain in force for as long as the execution order itself is in force. After an execution order is renewed according to the Rules of Court, a certificate of renewal issued by the sheriff could be registered at the registry of deeds.

What about execution orders themselves? Under what circumstances should they cease to bind the debtor's land? The issue of expiration and renewal of execution orders is dealt with in the *Rules of the Supreme Court, 1986,*[66] There are, however, several situations in which an execution order should cease to bind land. One ground for the release of an execution order has been noted: a request from the judgment creditor. Another obvious situation is where the creditor's judgment has been satisfied.[67] Other grounds under which a sheriff should release an execution order include the following:

1) That the matter has been settled and all sheriff's fees and disbursements have been paid;

2) Upon a conveyance of the land by the sheriff under execution;

3) Upon payment into Court of the sum due under the judgment together with sheriff's fees and disbursements;

4) Upon such further grounds as the Court considers just.

The fourth ground is intended to provide the Court with the flexibility to develop other rules under which the debtor's land can be released from the effect of the execution order.

The Commission recommends:

(17) *The Judicature Act, 1986* should be amended to provide that if the execution order filed with the sheriff is renewed in accordance with the Rules of Court, then in order for the execution order registered at the registry of deeds to remain effective, a certificate of renewal shall be registered at the registry of deeds prior to the date when the execution order filed with the sheriff, but for its renewal, would have expired.

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64 *Id.*, at 372.
65 *Ibid.*
66 *Supra*, n. 56. Rule 50.05(2) establishes that an execution order remains in force for six years and may be renewed thereafter.
67 Assuming all sheriff's fees and disbursements have been paid.

(18) *The Judicature Act, 1986* should be amended to provide that upon renewal of an execution order in accordance with the Rules of Court the sheriff, if so requested, shall issue a certificate of renewal.

(19) *The Judicature Act, 1986* should be amended to provide that an execution order shall cease to bind the execution debtor's land upon the issuing by the sheriff of a certificate of release on the following grounds:

1) upon the request of the judgment creditor and payment of all costs of execution;

2) that the judgment has been satisfied and all sheriff's fees and disbursements have been paid;

3) that the matter has been settled and all sheriff's fees and disbursements have been paid;

4) upon a conveyance of the land by the sheriff under execution;

5) upon payment in Court of the sum due under the judgment together with sheriff's fees and disbursements;

6) upon such further grounds as the Court considers just.

B. Attachment Orders

Attachment orders, unlike execution orders, do not have to be renewed periodically in order to continue to be effective against the attached property. Under Rule 28.05(4) of the *Rules of the Supreme Court, 1986*, the sheriff may not attach any property under the order after the expiration of ninety days from the date of its issue, but this does not affect the validity

of any attachments made within the ninety days.[68] An attachment, unless raised by the Court, will continue in force until the matter has been decided. As the attachment order itself has no time limit on its validity with respect to the property attached under the order, there is no reason to require the renewal of attachment orders registered at the registry of deeds.[69]

With regard to the grounds under which an attachment order may be released, it is clear that these are not the same as for execution orders.[70] Different considerations apply in the case of an attachment order. One of the main purposes of an attachment order is to ensure that the debtor will have sufficient assets in the jurisdiction to satisfy a judgment against him.[71] After a judgment has been entered against the debtor, the creditor will take out an execution order against the debtor; he will *convert* his attachment order into an execution order. The creditor should be encouraged to convert his attachment order within a reasonable time. For that reason, it is recommended that thirty days after the date of judgment the sheriff should be free to issue a certificate of release to an interested party.

Rule 28.13(c) provides several instances where an attachment order will cease to be effective:

> 28.13 When an attachment order has been granted, the Court may on notice
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> . . . . .

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68 **28.05(4)**: On the expiration of ninety days from the issue of an attachment order or within such further period of time as the Court may order, no property shall be attached under the order, but nothing herein shall be deemed to limit the validity of the order in respect of anything previously done thereunder or to limit the right of the Court or the Registrar to grant and issue a further attachment order in respect of the same or other property.

69 Rule 51.02(4) is virtually identical to Rule 28.05(4) except that the former rule deals with execution orders. However, the situation with respect to execution orders is affected by Rule 50.05 which states that an execution order is only valid for a period of six years from the date of its issue.
50.05: (1) An execution order, receivership order or contempt order is valid for a period of six years from the date of its issue.
(2) Where an order referred to in Rule 50.05(1) or a writ of *fieri facias* issued prior to September 2, 1986, has not been wholly executed, the Registrar may, at any time before its expiration, extend the validity of the order or writ of *fieri facias*, or of any renewal thereof, for a further term of six years commencing from the date of the order granting the extension.
(3) Where a writ of *fieri facias* issued prior to September 2, 1986, has not been wholly executed, the Registrar may, at any time before its expiration or the expiration of any renewal thereof, upon the filing thereof with the Registrar, issue an execution order in Form 51.02A for the amount payable under the judgment or the unsatisfied portion therof and any such execution order shall be valid for a period of six years from the date of its issue.
(4) Any priorities under an order referred to in Rule 50.05(1), a writ of *fieri facias* referred to in 50.05(2) or an execution order referred to in Rule 50.05(3), or any renewal thereof, shall be determined by reference to the date on which the original order of writ of *fieri facias* was deliverd to the Sheriff.

70 Though some will be same, such as a request by a judgment creditor to release the attachment order, or a settlement of the matter in dispute.

71 See discussion, *supra*, at 45*f*.

(c) upon being satisfied that the attachment order is not necessary for the security of a plaintiff, or a plaintiff has failed to bring the proceeding to trial promptly, or the proceeding has been discontinued or dismissed as against a defendant, or a plaintiff's claim against a defendant has been fully satisfied, or for other just cause, vacate or dissolve in whole or in part, the attachment order and any attachment made thereunder;

It is to be recommended, therefore, that upon receipt of a Court order under Rule 28.13(c) the sheriff shall issue a certificate of release and the debtor's land will cease to be bound.

Under Rule 28.07(1) of the Rules of Court, a defendant is entitled to regain possession of his attached land upon delivery either to the sheriff or to the Registrar of a bond in an amount equal to one and one quarter times the value of the attached property together with two sureties or other form of sufficient security. Here again, the sheriff should issue a certificate of release which would release the attached property from the binding effect of the attachment order.

The Commission recommends:

(20) The Judicature Act, 1986 should be amended to provide that an attachment order shall cease to attach the debtor's land upon the issuing by the sheriff of a certificate of release on the following grounds:

1) upon the request of the creditor and payment of all costs of attachment;

2) that the matter has been settled and all sheriff's fees and disbursements have been paid;

3) upon the expiration of thirty days after judgment on the matter and payment of all sheriff's fees and disbursements;

4) upon the receipt by the sheriff of a Court order and Rule 28.13(c) vacating the attachment order and payment of all sheriff's fees and disbursements;

5) upon delivery of a bond which satisfies Rule 28.07 and payment of sheriff's fees and disbursements.

8. Incidental Amendments

In order to accomodate these recommendations, some further amendments will have to be made to *The Registration of Deeds Act*.[72] In the first place, copies of execution orders and attachment orders, as well as certificates of renewal and certificates of release will have to be added to the list of documents registerable at the registry of deeds under section 6 of the Act.

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72 *Supra*, n. 1.

Secondly, section 7 deems anyone with an interest in land to have notice of any instrument registered at the registry of deeds. This provision may conflict with the proposed ten-day delay period for execution and attachment orders. To avoid the problem, section 7 should be amended to indicate that its effect is subject to section 9.

Finally, section 11 requires that every instrument be proved before it is registered. These provisions are relevant to documents executed by individuals. Court orders or documents issued by the sheriff do not need such proof. Section 11, therefore, should be amended to exclude execution orders, attachment orders, certificates of renewal and release from the demands for proof of execution.

The Commission recommends:

(21) *The Registration of Deeds Act* should be amended to provide that execution orders, attachment orders, certificates of renewal and certificates of release shall be included under section 6 of *The Registration of Deeds Act* as documents registerable at the registry of deeds.

(22) *The Registration of Deeds Act* should be amended to provide that the application of the deemed notice provision in section 7 of *The Registration of Deeds Act* shall be made subject to section 9 of that Act.

(23) *The Registration of Deeds Act* should be amended to provide that execution orders, attachment orders, certificates of renewal and certificates of release shall be excluded from the requirements dealing with proof of registration in section 11 of *The Registration of Deeds Act*.

Apart from the changes to *The Registration of Deeds Act*, some amendments to Rule 28 of the *Rules of the Supreme Court, 1986*[73] will also have to be made. Rule 28 concerns attachment orders and Rule 28.05(1)(g) deals with one of the sheriff's duties under an attachment order. According to this Rule, the sheriff has a duty to serve the occupant of the land to be attached. If there is no occupant, the sheriff is directed to post the land. By the completion of either of these acts, the land is deemed to be attached. Recommendation 4 of the Report, however, proposed that land be attached by the filing of an attachment order with the sheriff.[74] Rule 28.05(1)(g) could be amended simply by removing the phrase, "whereupon the interest of the defendant in the land shall be deemed to be attached to the extent of the plaintiff's claim against the defendant as shown in the attachment order." The result would be that while attachment would take place at the sheriff's office, the sheriff would still be under a duty to serve the attachment order within 90 days of its issue.

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73 *Supra*, n. 56.
74 See *supra*, at 32

Rule 28.14(2), which is concerned with execution against attached property, says that any attached property which has not been seized within 60 days of the granting of an execution order is to be returned to the person from whose possession the property was removed. This section, insofar as it concerns land, is contrary to Recommendation 20(1) of this Report, which proposes that land should continue to be attached by an attachment order until the sheriff issues a certificate of release and, furthermore, that the sheriff should issue a certificate of release upon the expiration of 30 days after judgment, assuming that all sheriff's fees and disbursements have been paid.[75] Rule 28.14(2) might easily be amended by excluding attachments against land from its operation. The section would continue to apply to attachments of personal property.

The Commission recommends:

(24) The *Rules of the Supreme Court, 1986* should be amended in order to eliminate from Rule 28.05(1)(g) the phrase "whereupon the interest of the defendant in the land shall be deemed to be attached to the extent of the plaintiff's claim against the defendant as shown in the attachment order."

(25) The *Rules of the Supreme Court, 1986* should be amended in order to indicate that Rule 28.14(2) is subject to section 134.1 of *The Judicature Act, 1986*.

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75 See *supra*, at 51.

CHAPTER 4
SUMMARY OF RECOMMENDATIONS

Set out below is a summary of the Commission's recommendations in respect of reform of this Province's legislation dealing with execution against land. The Chapter and page at which each recommendation is located in the body of the Report is indicated at the end of each recommendation.

(1) The Judicature Act, 1986 should be amended to add a provision stating that all interests in land are exigible. (Chapter 1, p. 9)

(2) Section 9 of The Registration of Deeds Act should be amended to remove the concept of actual seizure from the procedure establishing priorities between execution creditors and subsequent purchasers or mortgagees. (Chapter 2, p. 28)

(3) The Judicature Act, 1986 should be amended in order to add a provision which specifies the action by which an execution order shall bind land or an attachment order shall attach land. (Chapter 3, p. 29)

(4) The Judicature Act, 1986 should be amended to provide that the interest of a debtor in land, as well as the interest in land of any purchaser, mortgagee, or other transferee from the debtor under an instrument, shall be bound by an execution order or attached by an attachment order from the time of delivery of the order to the sheriff. (Chapter 3, p. 32)

(5) The Judicature Act, 1986 should be amended to provide that notwithstanding the delivery of an execution order or attachment order to the sheriff, no such order shall prejudice the title of any purchaser, mortgagee or other transferee of an interest in land from the debtor under an instrument who has registered his instrument at the registry of deeds before the registration of such order. (Chapter 3, p. 32)

(6) The Registration of Deeds Act and The Judicature Act, 1986 should both be amended to provide that, notwithstanding the registration of an execution order or attachment order at the registry of deeds, no such order shall prejudice the title of any purchaser, mortgagee or other transferee of an interest in land from the debtor under an instrument who has registered his instrument at the registry of deeds within ten days of the registration of the order in the registry of deeds, except in the case of a transferee who has had actual notice of the order prior to the execution of his instrument. (Chapter 3, p. 37)

(7) The Judicature Act, 1986 should be amended to provide that an execution order will bind and an attachment order will attach only specified portions of the debtor's land. (Chapter 3, p. 43)

(8) The Judicature Act, 1986 should be amended to provide that an execution order or attachment order shall not bind nor attach the land of a

debtor unless the order has appended to it a description of the land to be bound or attached that is sufficient to identify the property to a reasonable person. (Chapter 3, p. 45)

(9) The Judicature Act, 1986 should be amended to provide that an execution order or attachment order shall be subject to invalidation on the grounds of an error or omission in the order only if the error or omission has actually mislead a purchaser, mortgagee or other transferee of an interest in land from the debtor under an instrument and only if such error or omission would have mislead a reasonable person. (Chapter 3, p. 45)

(10) The Judicature Act, 1986 should be amended to provide that attachment orders as well as execution orders shall be accepted for registration at the registry of deeds. (Chapter 3, p. 46)

(11) The Judicature Act, 1986 should be amended to provide that the registry of deeds shall accept for registration copies of execution orders and attachment orders which have been certified by the sheriff as to the time of receipt at his office and that the copies are true copies. (Chapter 3, p. 47)

(12) The Judicature Act, 1986 should be amended to provide that upon the issuing by the sheriff of a certificate of release, an execution order or an attachment order filed with the sheriff shall cease to bind or to attach land. (Chapter 3, p. 48)

(13) The Judicature Act, 1986 should be amended to provide that any person with an interest in land bound or attached by an execution order or attachment order may apply for a certificate of release. (Chapter 3, p. 48)

(14) The Judicature Act, 1986 should be amended to provide that registration of a certificate of release shall render ineffective a registered execution order or attachment order. (Chapter 3, p. 48)

(15) The Judicature Act, 1986 should be amended to provide that in the event that the sheriff refuses to issue a certificate of release, the person who requested the certificate may make an application to the Trial Division of the Supreme Court for an order directing the sheriff to issue the certificate. (Chapter 3, p. 48)

(16) The Judicature Act, 1986 should be amended to provide that the sheriff shall issue a certificate of release upon the request of a creditor (provided all costs of execution or attachment have been paid), and in all other cases the sheriff shall not refuse to issue a certificate of release except on reasonable grounds. (Chapter 3, p. 48)

(17) The Judicature Act, 1986 should be amended to provide that if the execution order filed with the sheriff is renewed in accorance with the Rules of Court, then in order for the execution order registered at the registry of deeds to remain effective, a certificate of renewal shall be registered at the

registry of deeds prior to the date when the execution order filed with the sheriff, but for its renewal, would have expired. (Chapter 3, p. 49)

(18) The Judicature Act, 1986 should be amended to provide that upon renewal of an execution order in accordance with the Rules of Court the sheriff, if so requested, shall issue a certificate of renewal. (Chapter 3, p. 50)

(19) The Judicature Act, 1986 should be amended to provide that an execution order shall cease to bind the execution debtor's land upon the issuing by the sheriff of a certificate of release on the following grounds:

1) upon the request of the judgment creditor and payments of all costs of execution;

2) that the judgment has been satisfied and all sheriff's fees and disbursements have been paid;

3) that the matter has been settled and all sheriff's fees and disbursements have been paid;

4) upon a conveyance of the land by the sheriff under execution;

5) upon payment in Court of the sum due under the judgment together with sheriff's fees and disbursements;

6) upon such further grounds as the Court considers just. (Chapter 3, p. 50)

(20) The Judicature Act, 1986 should be amended to provide that an attachment order shall cease to attach the debtor's land upon the issuing by the sheriff of a certificate of release on the following grounds:

1) upon the request of the creditor and payment of all costs of attachment;

2) that the matter has been settled and all sheriff's fees and disbursements have been paid;

3) upon the expiration of thirty days after judgment on the matter and payment of all sheriff's fees and disbursements;

4) upon the receipt by the sheriff of a Court order under Rule 28.13(c) vacating the attachment order and payment of all sheriff's fees and disbursements;

5) upon delivery of a bond which satisfies Rule 28.07 and payment of all sheriff's fees and disbursements. (Chapter 3, p. 52)

(21) The Registration of Deeds Act should be amended to provide that execution orders, attachment orders, certificates of renewal and certificates of release shall be included under section 6 of The Registration of Deeds Act as documents registerable at the registry of deeds. (Chapter 3, p. 53)

(22) The Registration of Deeds Act should be amended to provide that the application of the deemed notice provision in section 7 of The Registra-

tion of Deeds Act shall be made subject to section 9 of that Act. (Chapter 3, p. 53)

(23) The Registration of Deeds Act should be amended to provide that execution orders, attachment orders, certificates of renewal and certificates of release shall be excluded from the requirements dealing with proof of registration in section 11 of The Registration of Deeds Act. (Chapter 3, p. 53)

(24) The Rules of the Supreme Court, 1986 should be amended in order to eliminate from Rule 28.05(1)(g) the phrase "whereupon the interest of the defendant in the land shall be deemed to be attached to the extent of the plaintiff's claim against the defendant as shown in the attachment order. (Chapter 3, p. 54)

(25) The Rules of the Supreme Court, 1986 should be amended in order to indicate that Rule 28.14(2) is subject to section 134.1 of The Judicature Act, 1986. (Chapter 3, p. 54)

APPENDIX A
The Judicature Act 1824

AN ACT
For the Better Administration of Justice in Newfoundland, and for Other Purposes

5 Geo. IV Cap. 67

The following sections are referred to in the body of the Commission's Report:

16. And be it further enacted, that in all actions at law or suits in equity which shall be brought in the said Courts respectively, where the debt or sum demanded shall not be sworn to as hereinafter mentioned, the defendant or defendants in such action or suit shall be made to appear to such action or suit by summons, to be issued by the Chief Judge of the said Supreme Court, or by the Judges of the said circuit Courts respectively, and served by the proper officer on the said defendant or defendants personally, or left at his, her or their usual place of abode; and in all cases where such summons shall be disobeyed, or where the debt, damage or thing demanded shall exceed ten pounds sterling money, and shall be sworn to in an affidavit made by the plaintiff or plaintiffs, or his, her or their lawful attorney, then the said defendant or defendants shall be made to appear by attachment of his, her or their goods, debts or effects, or by arrest of the person of the said defendant or defendants; and in case of his, her or their goods, debts or effects being attached as aforesaid, such goods, debts or effects, or so much thereof as shall be judged by the said Court sufficient to satisfy the debt or damages, shall be held as security for such debt or damages, and shall abide the order, judgment or decree of the Court issuing such attachment, unless the defendant or defendants, or some person on his, her or their behalf, shall appear and give good and sufficient bail, to be approved by such Court, to satisfy such judgment, decree or order; and where the defendant or defendants has or have been arrested, he, she or they shall not be discharged out of custody until he, she or they shall in like manner have given good and sufficient bail, to be approved by such Court, to satisfy the judgment, decree or order of the Court in the cause in which arrest was made; and it shall also be lawful for the said Courts respectively, when any such action or suit as aforesaid shall be depending therein, to cause to appear from day to day all parties interested therein, and to examine upon oath any of such parties, in case such examination shall appear to the said Court necessary for the discovery of the truth, but not otherwise; and thereupon and after due consideration of all circumstances of the case, to make such order, judgment or decree therein, and award such damages and costs as shall be just and equitable; and such order, judgment or decree shall be enforced by attachment and sale of the goods, debts and effects, or by arrest of the person or persons against whom such order, judgment or decree shall be made, and imprisonment of such person or persons until such order, judgment or decree shall be performed and satisfied.

27. And whereas it is expedient that provision should be made for the registration within the said colony of Newfoundland of all deeds, wills,

and other assurances whereby any lands or tenements therein situate may be granted, conveyed, demised, mortgaged, charged or otherwise affected; be it further enacted that the chief clerk of the Supreme Court of Newfoundland shall be also the registrar of deeds within the district or circuit in which the town of St. John's may be situate, and that the chief clerks of each of the Circuit Courts to be holden in and for the two other districts of the said colony, shall respectively be the registrars of deeds within such other districts or circuits; and in each of the said three districts an office shall be kept by such chief clerk respectively, for the due registration of all such deeds, wills, and other instruments as aforesaid.

28. And be it further enacted, that all deeds, wills, conveyances, and other assurances in writing, of what nature or kind soever, whereby any lands or tenements situate in the said colony or the dependencies thereof, may be hereafter granted, conveyed, devised, mortgaged, charged or otherwise affected or intended so to be, shall be registered at the office of registration within the district or circuit in which such lands may be situate; and that all such deeds, conveyances, and other assurances as aforesaid, shall be left for registration at such office within six months next after the execution thereof, by the party or parties from whom any interest may pass, in case such party or parties may, at the time of such execution thereof by him, her, or them, be resident within the said colony and its dependencies, or within twelve months in case such party or parties may at that time be resident elsewhere; and all such wills as aforesaid shall be left for registration at such office twelve months next after the death of the testator or testatrix.

29. And be it further enacted, that some or one of the parties executing any such deed, conveyance, or other document as aforesaid, shall appear before the registrar of deeds, and acknowledge the execution thereof, by them, him, or her; or in case none of the parties to any such deed, conveyance, or assurance shall be resident in the said colony, then the same shall be acknowledged before the said registrar of deeds by some person duly appointed for that purpose as the attorney of such parties; and in that case the execution of every such deed, conveyance, or other assurance shall be further verified by an affidavit to be sworn before the mayor or other principal magistrate of any city, town, or place in or near to which such parties respectively may be resident; and such affidavit shall also be preserved and registered at the office of the said registrar of deeds.

30. And be it further enacted, that the registrar of deeds shall and he is hereby required to endorse and subscribe on every such deed, conveyance, or other assurance, a certificate in which shall be expressed the day or time when the same was so acknowledged before him, and the names of the person or persons by whom such acknowledgement was made, and the time when the same was actually registered, and the volume and page in which the registry thereof is entered; and every such certificate so endorsed or subscribed shall be taken and allowed as evidence of the due registration of any such deed, conveyance or assurance.

31. And be it further enacted, that the registrar of deeds shall and he is hereby required to enter into a book of registry, to be by him regularly kept for that purpose, a memorial of every deed, conveyance or assurance which shall be so acknowledged before him; and every such memorial

shall contain a statement of the year and day of the month on which such deed, conveyance, or assurance shall bear date, the names and additions of all and every the parties, as well as the names and additions, if any, of the several subscribing witnesses thereto, the description at length of the lands or tenements conveyed or intended to be conveyed, charged or affected by such deed, conveyance, or assurance, as the same may be therein stated; all which memorials shall be entered and recorded in the said book of registry with all convenient dispatch, in the order of time in which the same may have been acknowledged before the said registrar.

32. And be it further enacted, that every deed, conveyance or assurance hereafter to be made, whereby any lands or tenements situate in Newfoundland or the dependencies thereof, shall be granted, conveyed, released, charged or incumbered, or intended so to be, which shall not be registered within the time and in the manner hereinbefore mentioned, shall be absolutely null and void to all intents and purposes: Provided always, that every such deed, conveyance or assurance shall be deemed and taken to be a registered deed, conveyance or assurance within the meaning of the Act, from the time when the execution thereof shall be acknowledged in manner aforesaid before such registrar of deeds as aforesaid.

CHAPTER C-36

AN ACT RESPECTING CHATTELS REAL

The within **consolidation** of *The Chattels Real Act* has been prepared for the Commission's internal purposes.

Analysis

Section:		Section:	
1.	Short title	4.	Disposition of chattels real
2.	All lands, etc. to be "chattels real"	5.	Life estates and future interests
3.	Rights and claims to land		

Short title

1. This Act may be cited as the *Chattels Real Act.*

RSN1970 c36 s1

All lands, etc. to be "chattels real"

2. All lands, tenements and other hereditaments in the province, which by the common law are regarded as real estate, shall in all courts in the province, be held to be "chattels real", and shall go to the executor or administrator of a person dying seized or possessed of them as other personal estate now passes to the personal representatives, a law, usage or custom to the contrary notwithstanding.

RSN1970 c36 s2

Rights and claims to land

3. (1) All rights or claims which have accrued in respect to lands or tenements in the province and which have not already been adjudicated upon, shall be determined according to section 2.

(2) Nothing in this section shall extend to a right, title, or claim to lands, tenements or hereditaments, derived by descent, and reduced into possession before June 12, 1834.

RSNi1970 c36 s3

Disposition of chattels real

4. (1) A husband and wife shall, for all purposes of acquisition of an interest in a chattel real, under a disposition made or coming into operation on or after May 5, 1972, be treated as 2 persons.

(2) Every tenancy by entireties existing immediately before May 5, 1972, shall, but without prejudice to a beneficial interest, as from May 5, 1972, be converted into a joint tenancy.

1972 No13 s2

Life estates and future interests

5. A valid life estate and a future interest that can be created by will in a chattel real may after May 5, 1972, also be created by deed without the interposition of a trustee.

1972 No13 s2

Priority Lost by Laches

7. Where several judgments against the same person have been registered in the same registry for one year, and any judgment creditor whose judgment was so registered before the judgment of another judgment creditor does not take effective steps to sell the land bound by the judgments, the subsequent judgment creditor may give written notice to the prior judgment creditor requiring him to sell such land within three months after the service of such notice upon him.

8. If such prior judgment creditor does not, in the opinion of the court or a judge, take effective steps to sell the land within three months from the service of such notice, the subsequent judgment creditor giving the notice shall acquire priority for his judgment over the judgment of the judgment creditor upon whom such notice is served, and may, upon notice of the application to such judgment creditor, obtain from the court in which his judgment was obtained, or a judge thereof, an order in the action for leave to sell the said land, free from the lien or incumbrance of the prior judgment.

APPENDIX B
Draft Amendments

1. Draft Amendments To *The Judicature Act, 1986*

S. 134.1 of *The Judicature Act, 1986*

(1) In this section
(a) *instrument* has the same meaning as in *The Registration of Deeds Act*;
(b) *transferee* includes purchasers and mortgagees.

(2) All interests in land are subject to orders of attachment and execution.

(3) An execution order binds and an attachment order attaches the interest of the debtor as well as the interest of any transferee from the debtor in the land described in a schedule to the attachment order or execution order.

(4) The interest of a debtor in the land described in the attachment order or execution order, as well as the interest of any transferee from the debtor, is attached or bound from the time the attachment order or execution order is delivered to the sheriff.

(5) Notwithstanding subsection 4, no attachment order or execution order shall prejudice the title of any transferee of an interest in land from the debtor under an instrument who, without having actual notice of the attachment order or execution order prior to taking his interest, has registered his instrument at the registry of deeds any time up to and including ten days after registration at the registry of deeds of a copy of such order, certified by the sheriff as a true copy and as to the time of receipt at his office.

(6) An attachment order or execution order against land delivered to the sheriff shall contain a description of the land which is the subject of the order.

(7) The description referred to in subsection 6 shall be a description sufficient to identify the land to a reasonable person.

(8) Where the Court determines that:
(a) an error or omission in an attachment order or execution order has mislead a transferee of an interest in land from the debtor;
(b) the transferee's interest is affected by the attachment order or execution order; and

(c) such error would have mislead a reasonable person
the Court may declare the attachment order or execution order to be fraudulent and void as against the transferee.

(9) An execution order registered at the registry of deeds and renewed in accordance with subsection 11 will continue to be effective for as long as the execution order filed at the sheriff's office remain in force.

(10) Upon renewal of an execution order filed at the sheriff's office, the sheriff, if so requested, shall issue a certificate of renewal.

(11) An execution order registered at the registry of deeds shall be renewed by the registration at the registry of deeds of a certificate of renewal prior to the expiry of the execution order filed at the sheriff's office.

(12) An execution order shall cease to bind and an attachment order shall cease to attach land upon the issuing by the sheriff of a certificate of release.

(13) Any person with an interest in land bound by a execution order or attached by an attachment order may apply for a certificate of release.

(14) Provided that all costs of execution or attachment have been paid, the sheriff shall issue a certificate of release upon the request of a creditor, and in all other circumstances, the sheriff shall not unreasonably refuse a request to issue a certificate of release.

(15) Should the sheriff refuse to issue a certificate of release, the person who requested the certificate may make application to the Trial Division of the Court for an order directing the sheriff to issue a certificate of release and the Court may make such an order as it thinks just.

(16) In the case of an execution order, the sheriff shall issue a certificate of release on the following grounds:
(1) upon the request of the judgment creditor and payment of all costs of execution;
(2) that the judgment has been satisfied and all sheriff's fees and disbursements have been paid;
(3) that the matter has been settled and all sheriff's fees and disbursements have been paid;
(4) upon a conveyance of the land by the sheriff under execution;

(5) upon payment in Court of the sum due under the judgment together with sheriff's fees and disbursements; or
(6) upon the receipt of an order of the Court directing the sheriff to issue a certificate of release, which the Court may issue on such grounds as it considers just.

(17) In the case of an attachment order, the sheriff may issue a certificate of release on the following grounds:
(1) upon the request of the creditor and payments of all costs of attachment;
(2) that the matter has been settled and all sheriff's fees and disbursements have been paid;
(3) upon the expiration of thirty days after judgment on the matter and payment fo all sheriff's fees and disbursements.
(4) upon the receipt by the sheriff of a Court order and Rule 28.13(c) vacating the attachment order and payment of all sheriff's fees and disbursements;
(5) upon delivery of a bond which satisfies Rule 28.07 and payment of sheriff's fees and disbursements.

(18) An execution order registered at the registry of deeds or an attachment order likewise registered will cease to be effective upon the registration of a certificate of release.

2. **Draft Amendments to *The Registration of Deeds Act***

S. 6 of *The Registration of Deeds Act*

(1) Subject to subsections (2) and (4) there shall be registered in the Registry in suitable books which the Lieutenant-Governor in Council shall provide for the purpose

(a) conveyances, mortgages, releases or transfers of mortgages, leases, assignments of leases, bonds and agreements for sale or purchase of land;

(b) deeds and other assurances whereby lands or tenements in the province are hereafter granted conveyed, mortgaged, charged or otherwise affected;

(c) powers of attorney or substitutions thereof under which any documents referred to in paragraphs (a) and (b) are executed;

(d) judgments of foreclosure and other judgments affected any interest in or title to land;

(d.1) copies of execution orders and attachment orders certified by the sheriff as true copies and as to their receipt at his office;

(d.2) certificates of renewal and certificates of release;

(e) conveyances of personal chattels referred to in Section 33; and

(f) such other documents in relation to land as the Registrar may accept.

S. 7 of *The Registration of Deeds Act*

Subject to section 9 of this Act, the registration of any instrument under this Act, or any former Act, shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration; but nevertheless, it shall be the duty of the Registrar not to register any instrument except on such proof as is required by this Act.

S. 9 of *The Registration of Deeds Act*

All instruments made after the twenty-seventh day of March, Anno Domini eighteen hundred and sixty-two, and not duly proved and registered, and every mortgage by deposit of deeds without writing, shall be judged fraudulent and void both at law and in equity, as against any subsequent purchaser or mortgagee for valuable consideration who shall first register his instrument, or against any trustee of an insolvent estate, or any assignee or trustee under a conveyance for the benefit of creditors, or against **a creditor who has registered a copy of the order certified by the sheriff as a true copy and as to the time of receipt at his office either:**

(a) at least ten days prior to the registration of the instrument or the deposit of deeds without writing;

or

(b) within ten days prior to the registration of the instrument or deposit of deeds without writing and the purchaser or mortgagee, as the case may be, has had actual notice of the attachment order or execution order prior to the execution of the instrument.

S. 11 of *The Registration of Deeds Act*

Every instrument shall, before registration, be proved either

(a) by the acknowledgment, under oath, by all the parties executing any such instrument, from whom any interest passes, of the execution thereof; or

(b) by the oath of a subscribing witness or witnesses to any such instrument, that all the parties thereto, from whom any interest passes, executed the same in his or their presence.

(c) the requirements of this section do not apply to the instruments listed in subsections d.1 or d. 2 in section 6 of this Act.

3. Draft Amendments to *The Rules of the Supreme Court, 1986*

Rule 28.05 of *The Rules of the Supreme Court, 1986*

(1) Unless the Court otherwise orders, an attachment order in Form 28.05A shall direct the sheriff within ninety days of its issue or within such further time as the Court orders

(g) where real property is to be attached and a bond is not delivered as provided in Rule 28.07, to serve on the occupant of the real property, or, if there is no occupant of the real property, to post in a conspicuous place thereon, a true copy of the attachment order.

Rule 28.14 of *The Rules of the Supreme Court, 1986*

(2) Subject to section 134.1 of *The Judicature Act, 1986*, any attached property or the proceeds thereof that are not seized under an execution order within sixty days of the granting of that order shall, unless the Court otherwise orders, be returned by the sheriff to the defendant or other person who had possession of the property at the time it was attached.

APPENDIX C
Outside Consultants

The Commission gratefully acknowledges the thoughtful comments received from the following at an Execution Round Table held at the Commission's offices in October 1987 and at an Execution Forum held in Corner Brook in March 1989:

I. Execution Round Table, St. John's, October 1987
Robert Andrews
Kenneth Baggs
Ronald Cole
Wayne Jennings
Wayne Myles
Kevin O'Hara
Wayne Spracklin
Kenneth Templeton

II. Execution Forum, Corner Brook, March 1989
The Hon. Lynn Verge, Q.C., Minister of Justice
Hon. Mr. Justice Seamus O'Regan
Hon. Mr. Justice David Riche
Hon. Mr. Justice Frederick Woolridge
His Honour Judge B. LeGrow
His Honour Judge R. T. Smith
William Gillies, Q.C., Registrar, Registry of Deeds, Companies & Securities
Leslie Thoms, High Sheriff for Newfoundland
Guy Badcock, Sub-Sheriff
Nicholas Avis
Noel Clarke, Q.C.
Katherine Crosbie
Anthony Downey
Brian Dunphy
Alphonsus Faour
Joseph Hutchings
Richard LeBlanc
Paul G. Malone
Beverley Marks
David A. Mills
Kevin O'Hara
Camille Pennel
Cy Simmons
Rita Specker
Fred Stagg
Graham Watton
Brian Wentzell
Elaine Wychreschuck